SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART** **36**

Justice

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INDEX NO. 156724/2018

NOREEN SCUILETTI,

Plaintiff,

MOTION SEQ. NO. 006

- v -

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, STEWART INTERNATIONAL AIRPORT, and AFCO AVPORTS MANAGEMENT, LLC,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133

were read on this motion to/for **SUMMARY JUDGMENT**.

In this personal injury action, plaintiff alleges that defendants' failure to maintain the Stewart International Airport ("premises") in a reasonably safe condition led to her slip and fall at the premises. Plaintiff claims that defendants The Port Authority of New York & New Jersey ("Port Authority") and Stewart International Airport ("SWF") owned and operated the premises. AFCO AvPorts Management, LLC ("AvPorts") maintains the premises, according to plaintiff. She sets forth that on January 19, 2018, there was water accumulation on the floor at or near the women's restroom entrance in the baggage area of the premises for an unreasonable period of time, creating a dangerous and unsafe condition. Plaintiff claims defendants either created the unsafe condition, were aware of the dangerous condition, or should have been aware of it, and that they failed to remediate it or warn of its danger. Plaintiff asserts that she slipped and fell because of the water accumulation, and that she has been seriously and permanently injured as a result. She further alleges that she was free from comparative fault and hence, she demands a judgment against defendants in an amount to be determined at trial, together with costs and disbursements (NYSCEF Doc. No. 1, *summons and verified complaint*).

Both defendants Port Authority and AvPorts filed answers. Therein, defendants denied all claims of liability as set forth in the complaint.

Port Authority and AvPorts (collectively "defendants") now move, pursuant to CPLR 3212, for summary judgment in their favor and against plaintiff. In the statement of material facts, AvPorts claims that it had a contract with Port Authority to perform certain operational and maintenance functions, including providing janitorial services at the premises during the relevant times. Defendants assert that as plaintiff was attempting to access the women's restroom at the premises on January 19, 2018, AvPorts had placed at least three (3) yellow wet floor caution signs in that part of the terminal, with one by the water fountain outside of the bathroom. Defendants also note plaintiff's deposition testimony that she "started walking towards the bathroom and . . . noticed to the right there were wet water signs" (NYSCEF Doc. No. 121, *defs'*

memo of law, pg 4). They further claim that shortly before plaintiff arrived in the area outside the restroom where she fell, another individual used the water fountain in the same area without falling. Defendants argue that, in addition to testifying that she observed the wet floor signs before she fell, video surveillance also provides pictorial evidence that there were three (3) visible yellow wet floor signs in the area to warn pedestrians in the area of a potentially dangerous condition. Hence, the alleged dangerous condition was open and obvious to plaintiff and, therefore, defendants cannot be found liable for negligence. Furthermore, Port Authority contends that as an out-of-possession landlord, it cannot be liable for plaintiff's injuries because AvPorts was contracted to perform certain operational and maintenance functions at the premises on the date of the accident. Port Authority further articulates that it neither had notice of the condition nor assumed a duty to maintain or make repairs in the area (*id.*, at pg 10).

In opposition, plaintiff argues that the motion for summary judgment filed on June 14, 2021, is untimely, as it was made more than 120 days after the filing of the Note of Issue and, therefore, contrary to the 60-day court ordered time-period for summary judgment motions. According to plaintiff, while it is undisputed that she slipped and fell, defendants' moving papers are devoid of any proof that they did not cause or create the condition or have actual/constructive notice of the water hazard which caused her injuries (NYSCEF Doc. No. 123, *opposition*, ¶16). Plaintiff contends that defendants fail to provide any proof regarding their maintenance activities on the day of the accident. To this point, plaintiff cites to the deposition of Lee Wright ("Wright deposition"), Avports terminal manager, who allegedly conceded that Avports has no records demonstrating when the subject area was last inspected or cleaned prior to the accident. Plaintiff maintains that defendants' reliance on the placement of yellow caution signs is misplaced because, although the signs obviate the duty to warn, they do not eliminate defendants' duty to maintain the premises in a reasonably safe condition (*id.*, at ¶20). Plaintiff contends that she did not see the water before she fell and that, there has not been any testimony or claim from defendants that any of the people who responded to the scene of the accident recalled having looked for or seen any water in the area of plaintiff's fall, belying the claim that the condition complained of was open and obvious. Plaintiff proffers the expert report of Robert Bertman, a licensed Profession and Mechanical Engineer, who simulated conditions on the subject floor of the premises and opined that "the [defendants'] failure to provide a dry and/or slip-resistant walkway floor surface at the subject pedestrian walkway violated accepted industry safety practices," and that defendants and their agents/employees were aware or should have been aware that the potential for slips increases when the floor surface becomes wet (*id.*, at ¶30). Lastly, plaintiff argues that Port Authority has failed to establish its *prima facie* entitlement to summary judgment on its argument that it is an "out-of-possession landlord," because Port Authority does not proffer a lease to support the claim. Although Port Authority submitted an "Airport Management and Operations Services Agreement" ("Agreement"), plaintiff maintains that this appears to be solely a contract for services to be performed by AvPorts at premises, which does not create a landlord-tenant relationship (*id.*, at ¶34).

In reply, defendants argue that they were under the impression that the 60-day deadline for summary judgment, imposed by the previous Justice, was no longer binding when the case was transferred to the undersigned. Defendants aver that as Part 36 did not have any Part rules at the time of the filing of the Note of Issue, they filed their motion in accordance with the 120-day deadline set forth by CPLR 3212(a). As to good cause, they contend the interests of justice

would not be served if litigants are punished for filing their motion within the statutory 120-day time limit in the event there are no published Part rules outlining a deadline for filing a dispositive motion after the filing of the Note of Issue. (NYSCEF Doc. No. 133, *reply*, ¶21). Defendants further assert that plaintiff has not been prejudiced by the filing of the pending motion within the 120-day deadline, as opposed to the purported 60-day deadline. Lastly, they posit that the motion for summary judgment should be granted because they have met their *prima facie* entitlement to judgment, and whether plaintiff saw the alleged water on the ground prior to her fall is irrelevant. They maintain that by placing the wet floor sign in a readily observable position, they have satisfied their duty to warn plaintiff. According to defendants, Bertman's expert affidavit fails to raise a triable issue of fact, because they deny that any dangerous condition existed at the time of plaintiff's alleged fall and argue that they satisfied their duty to warn plaintiff of the alleged hazardous condition by placing the said warnings in readily observable positions. As to the out-of-possession landlord argument, Port Authority reiterates that since AvPorts was contracted to provide janitorial services at the premises, it had no notice of the condition, and assumed no duty to maintain or make repairs in the area and hence, it cannot be liable for plaintiff's alleged injuries.

It is well-settled that the 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated" (CPLR 3212 [f]; see *Zuckerman*, 49 NY2d at 562).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]).

"While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion and may do so on the basis of clear and undisputed evidence" (*Tagle v Jakob,* 97 NY2d 165, 169 [2001]). "For a condition to be open and obvious as a matter of law requires that the condition "could not be overlooked by anyone making a reasonable use of his senses" (*Garrido v City of New York,* 9 AD3d 267, 268 [1st Dept 2004]). However, the mere fact that a defect or hazard is capable of being discerned by a careful observer is not the end of the analysis. (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 59, 72 [1st Dept 2004]). "The nature or location of some hazards, while they are technically visible, make them likely to be overlooked." (*Id.*) Moreover, the extent to which a defect is open and obvious addresses the issue of plaintiff's comparative negligence, not the defendant's overall duty to maintain its premises in a reasonably safe condition. (*Id.*, *citing Acevedo v Camac*, 293 AD2d 430, 431 [2d Dept 2002]).

Where members of the public frequent a location, a landowner owes a non-delegable duty to provide member of the general public with a reasonably safe premises, including a safe means of ingress and egress. (See *LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286, 287 [1st 2008]). "An out-of-possession landlord 'is generally not liable for negligence with respect to the condition of property . . . unless [she or he] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs . . . and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Vargas v Weishaus*, 199 AD3d 620, 623 [1st Dept 2021], quoting *Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525, 527 [1st Dept 2017]).

"When a motion for summary judgment is untimely, the movant must show good cause for the delay; otherwise the late motion will not be addressed. Further, a court has broad discretion in determining whether the moving party has established good cause for the delay" (*Lewis v Rutkovsky*, 153 AD3d 450, 453 [1st Dept 2017]). To establish good cause, a movant must provide "a satisfactory explanation for the untimeliness" in moving for summary judgment; whether the motion is meritorious or nonprejudicial is irrelevant (*Brill v City of New York*, 2 NY3d 648, 652 [2002]).

Here, the court first considers whether defendants' motion for summary judgment was untimely. Indeed, defendants' motion for summary judgment was untimely in that it was filed on October 12, 2021, one hundred and twenty (120) days after the filing of the Note of Issue and sixty (60) days after Justice Ling-Cohan's December 14, 2019 order which imposed the deadline for making such a motion (NYSCEF Doc. No. 22, *So-Ordered Preliminary Conference order*). Defendants have not demonstrated good cause for the delay. Since the Status Conference order did not modify the deadline to file summary judgment after the filing of the Note of Issue, there was no ambiguity that the 60-day deadline, pursuant to the Preliminary Conference order, was controlling.[1] (see *O'Leary v S&A Elec. Contr. Corp.*, 149 AD3d 500, 503 [1st Dept 2017]; *Giudice v Green 292 Madison, LLC*, 50 AD3d 506, 506 [1st Dept 2008]). Defendants could have resolved any claimed confusion by contacting the court to inquire about the deadline for filing a motion for summary judgment. (See *Fine v One Bryant Park, LLC*, 84 AD3d 436, 436 [1st Dept 2011]). In the absence of a showing of good cause for the delay, the court has no discretion to entertain even a meritorious motion for summary judgment (*Brill*, 2 NY3d at 650-651).

Even were this court to consider the motion, it would be denied due to issues of fact. Defendants have demonstrated that they placed at least three wet caution signs in the area and that said warnings were open and obvious to plaintiff. And, AvPorts terminal manager Lee Wright avers that that the warning signs were put out as a safety precaution and not in response to complaints regarding the condition of the floor where plaintiff fell. However, contrary to defendants claim, "[t]he mere placement of a wet floor warning sign does not automatically absolve defendant of negligence" (*Hamilton v 3339 Park Dev. LLC*, 158 AD3d 440, 442 [1st Dept 2018], citing *Felix v Sears, Roebuck & Co.*, 64 AD3d 499, 500 [1st Dept 2009]).

[1] While a different Justice was assigned to this matter following the retirement of J. Ling-Cohan, the case has been in the Part 36 inventory since the filing of the Request for Judicial Intervention (RJI) on November 8, 2018. (NYSCEF Doc. No. 14).

Defendants' failure to offer proof regarding their maintenance activities at the premises on the day of the accident, warrants denial of the motion (see *Tucker v New York City Hous. Auth.*, 127 AD3d 619, 620 [1st Dept 2015]). Plaintiff testified at her deposition that she slipped and fell on water on defendants' premises, contrary to defendants' assertion that there was no water on the floor. Thus, given the conflicting claims in the competing deposition transcripts, any determination would be based upon the credibility of the parties, which is to be resolved at trial, not on a motion for summary judgment (see *DeSario v SL Green Mgt. LLC*, 105 AD3d 421, 422 [1st Dept 2013]).

Additionally, Port Authority has not demonstrated that it is an out-of-possession landlord. Generally, an out-of-possession landlord is not liable for injuries resulting from the condition of the demised premises (see *Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 138 [2019]). The court notes that Port Authority does not submit any lease demonstrating that it lacked control of the premises, and that it was neither "contractually obligated to make repairs and/or maintain the premises [n]or has a contractual right to reenter, inspect and make needed repairs" (*Sapp*, 150 AD3d at 527). Port Authority, however, submits the agreement, which contains a provision stating that "no relationship of landlord and tenant or licensor and licensee is created or intended to be created," and that AvPorts is Port Authority's contractor at the premises. The agreement contains additional provisions such that at its sole discretion, Port Authority may hire outside vendors to perform any work AvPorts was contracted to perform if AvPorts did not perform to Port Authority's satisfaction (NYSCEF Doc. No. 120, *AvPorts Agreement*, pg 130, 139). Therefore, that portion of defendant's motion seeking judgment in its favor that Port Authority as an out-of-possession landlord is denied. Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants.

This constitutes the decision and order of this court.

October 11, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[X]	**DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**			[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**			[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**