

Rockefeller v Solovieff Realty Co., L.L.C.

2023 NY Slip Op 34265(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 155984/2020

Judge: David B. Cohen

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

BRAD ROCKEFELLER,

Plaintiff,

- v -

SOLOVIEFF REALTY CO., L.L.C., SOLOW BUILDING
COMPANY II L.L.C., SOLOW REALTY & DEVELOPMENT
COMPANY, L.L.C., L&K PARTNERS, INC.,

Defendants.

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INDEX NO. 155984/2020

MOTION DATE 08/17/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for DISMISS.

In this premises liability action, defendants Solovieff Realty Co., L.L.C., Solow Building Company II L.L.C., Solow Realty & Development Company, L.L.C., and L&K Partners, Inc., (collectively, defendants) move pursuant to CPLR 3211(a)(3) and (a)(7) to dismiss plaintiff’s Labor Law §§ 200 and 241(6) claims and pursuant to CPLR 3212 for summary judgment dismissing the complaint.

I. BACKGROUND

Defendants Solovieff Realty Co., L.L.C., Solow Building Company II L.L.C., Solow Realty & Development Company, L.L.C., (collectively, Solow) own and manage a commercial property located at 9 West 57th Street in Manhattan (premises). Defendant L&K Partners, Inc. is a general contractor and was hired by Chanel, a nonparty tenant of the premises to renovate office space located on the seventh floor of the premises (NYSCEF 58).

At the time of the accident at issue here, plaintiff was employed by Kore 1 LLC as an IT service management consultant and had been outsourced to provide IT services to Chanel

(NYSCEF 50). It is undisputed that his work for Chanel was not construction-related (NYSCEF 58).

At his deposition, plaintiff testified that on February 21, 2020, at approximately 4:45 pm, as he exited the west side door of Chanel's office space, he tripped over remnants of carpet in the common hallway of the premises and fell, sustaining injuries. The west side door opened outward into the common hallway and as plaintiff exited the door, he was looking down the length of the hallway to avoid hitting anyone approaching the door. A few minutes after the accident, plaintiff took photographs of the flooring outside of the door and reported its condition to building security. He had not used the west side exit door before his accident (NYSCEF 50).

Roderick Johnson, the commercial property manager for Solow Management Company on the date of plaintiff's accident, testified at his deposition that Solow employees generally inspected the building in the morning, "including any areas under construction to make sure the floor covering was clean and in decent condition." When shown plaintiff's photographs, Johnson testified that he had seen the floor when it was covered by normal Masonite but did not recall seeing it as depicted in the photographs, and described the flooring shown as a "nonstandard manner of floor covering" (NYSCEF 52).

At his deposition, L&K's project manager for the renovation project at the premises testified that plaintiff's photographs reflected flooring that had been installed by L&K employees, which he described as "padding that we put down on the floor with plastic underneath to protect the existing carpet" and that one of the photographs showed the protection "rolled over." The method for installing the padding was determined by L&K employees, who had been instructed to install it in a safe manner, meaning "in a means that it doesn't roll up or doesn't pick up." The manager further testified that he visited the premises daily and walked the

site to observe construction activities in general, and he did not know how long the flooring shown in the photographs had been present before the accident (NYSCEF 51).

Defendants now move to dismiss plaintiff's Labor Law claims on the grounds that:

(1) the conditions that lead to the accident were open, notorious, and not inherently dangerous; (2) Solow did not have notice of the condition that caused the fall; (3) plaintiff impermissibly speculates as to the cause of his fall; and (4) L&K Partners cannot be held liable in tort to a third-party plaintiff. Plaintiff opposes the motion.

II. MOTION TO DISMISS

As Plaintiff concedes that Labor Law §§ 200 and 241(6) are inapplicable here, those claims are dismissed (NYSCEF 55 at 2).

III. SUMMARY JUDGMENT

A. Applicable law

A party moving for summary judgment under CPLR 3212 “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]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]).

Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

To establish a prima facie claim for negligence, a plaintiff must prove: a duty owed to the plaintiff by defendant, a breach of that duty, and injury proximately resulting therefrom (*Pasternac v Laboratory Corp of Am. Holdings*, 27 NY3d 817, 825 [2016]). In premises liability actions, to prove a duty owed by the owner, the plaintiff must show that the owner had actual or constructive notice of the hazardous condition that caused the injury (*Juarez by Juarez v Wavecrest Mgmt. Team*, 88 NY2d 628, 646 [1996]; *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

Moreover, a contractor may be held liable for injury to a non-party for negligence where: (1) in failing to exercise reasonable care, it launched a force or instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the contracting party's duties; or (3) the contracting party entirely displaced the other party's duty to maintain the premises safely (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]; see *Rahim v. Sottile Sec. Co.*, 32 AD3d 77, 80 [1st Dept 2006]).

B. Duty

Movants argue that they did not owe plaintiff a duty to protect or warn him because the condition that caused his fall was open and obvious, and not inherently dangerous. Plaintiff denies that the condition was open and obvious as he was unable to look at the floor but instead was focused on looking down the hall to make sure he did not hit anyone with the door he was opening.

“Establishing that a hazardous condition is open and obvious relieves a party charged with maintaining the premises of the duty to warn of the condition but does not abate the duty to maintain the premises in a reasonably safe condition” (*Garrido v City of New York*, 9 AD3d 267, 267-268 [1st Dept 2004]). However, a court is not “precluded from granting summary judgment

to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous” (*Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009], quoting *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

“For a condition to be open and obvious as a matter of law, it must be one that could not be overlooked by an observer reasonably using his or her ordinary senses (*Garrido*, 9 AD3d at 268; see *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70, 72 [1st Dept 2004]).

However, “even visible hazards do not necessarily qualify as open and obvious” because the “nature or location of some hazards, while they are technically visible, make them likely to be overlooked” (*id.* at 72; see *Mauriello v. Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 [1st Dept 2004]).

The burden is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses (*Powers v 31 E LLC*, 123 AD3d 421, 422 [1st Dept 2014]). Further, whether a condition is not inherently dangerous or constitutes a reasonably safe environment depends on the totality of the facts of each case and is generally a question of fact for the jury (see *Russo v Home Goods, Inc.*, 119 AD3d 924, 925-926 [2d Dept 2014]; *Trincere v Count of Suffolk*, 90 NY2d 976 [1997] [internal quotation marks and citation omitted]). In assessing inherent dangerousness, the Court may consider factors including the nature and location of the condition (see *Holmes v. City of New York*, 187 NYS3d 432, 433 [1st Dept 2022]).

Here, plaintiff testified that he was looking down the hallway when he exited the door, rather than on the floor, thus causing him to trip over the remaining carpet. Absent any contrary evidence, movants fail to establish, prima facie, that the condition was open and obvious (see *Ward v Ruppert Hous. Co., Inc.*, 130 AD3D 467 [1st Dept 2015] [finding triable issue of fact as

to whether doormat was open and obvious where plaintiff was looking straight ahead]; *Flanger v 2461 Elm Realty Corp.*, 123 AD3d 1196 [3d Dept 2014] [question of fact as to whether condition of curb was open and obvious as plaintiff testified she was looking ahead of her when she fell]).

Moreover, based on the testimony of movants' witnesses that the condition was not the normal and usual way of covering the floor, and that a safe way of installing a carpet is by using means that keep it from rolling or being picked up, which was not done here, movants do not meet their burden of showing that the condition was not inherently dangerous.

C. Causation

Movants next argue that plaintiff merely speculates as to the cause of his fall, which is insufficient to support his claim. Plaintiff argues that his testimony was sufficient as to causation and conclusions not speculative or without foundation.

To establish causation, a plaintiff must present evidence that permits a finding of proximate cause based on logical inferences, not speculation (*see Reed v. Piran Realty Corp.*, 30 AD3d 319, 319 [1st Dept 2006]).

Here, plaintiff identified the floor covering and/or carpet remnants as causing his fall, and thus sufficiently provided a non-speculative basis for the accident (*see Martinez v City of New York*, 190 AD3d 561 [1st Dept 2021] [affirming denial of summary judgment where plaintiff identified cause and general location of the alleged accident]; *Aller v City of New York*, 72 AD3d 563, 564 [1st Dept 2010] [lower court erred in finding plaintiff's testimony unduly speculative with respect to the location and cause of her injury where she testified she fell due to unlevel ground]).

In any event, "any inconsistencies in plaintiff's testimony as to the cause of [his] fall present credibility issues for the jury's determination" (*Martinez*, 190 AD3d at 561).

D. Notice

Movants next argue that they lacked notice of the flooring condition that caused plaintiff's fall and therefore cannot be held liable. In opposition plaintiff argues that movants have not sustained their burden of proof as to constructive notice and furthermore, actual notice is presumed because defendants created the condition that caused plaintiff's fall.

“The imposition of liability in a slip-and-fall case requires evidence that the defendants created the dangerous condition which caused the accident, or that they had actual or constructive notice of that condition and failed to remedy it within a reasonable time” (*Perlongo v Park City 3 & 4 Apts., Inc.*, 31 AD3d 409, 410 [2d Dept 2006]; see *Mercer v City of New York*, 88 NY2d 955, 956 [1996]). “A defendant establishes that it lacked actual notice when it produces a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before plaintiff fell” (see *Velocci v Stop & Shop*, 188 AD3d 436, 439, 133 N.Y.S.3d 569 [1st Dept 2020]).

“To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it” (*Mitchell v City of NY*, 29 AD3d 372, 374 [1st Dept 2006], quoting *Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]). “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” (*Johnson v Pawling Cent. Sch. Dist.*, 196 AD3d 686, 688 [2d Dept 2021] quoting *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2008]). “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” (*Williams v Island Trees Union Free*

Sch. Dist., 177 AD3d 936, 938 [2d Dept 2019], quoting *Herman v Lifeplex, LLC*, 106 AD3d 1050, 1051 [2d Dept 2013] [additional citation omitted]).

While movants provided evidence about the building's general inspection practices, they did not submit evidence showing when they last inspected the accident location before the accident. In any event, L&K's testimony indicates that it placed the flooring at issue, and thus allegedly caused the accident, rendering it irrelevant whether it had notice of it before the accident (*Balbuena v 395 Hudson N.Y., LLC*, 214 AD3d 586, 587 [1st Dept 2023] [affirming denial of summary judgment as contractor that placed Masonite boards which caused slip and fall failed to show that it did not create dangerous condition]).

E. Independent contractor liability

Finally, L&K argues that as an independent contractor, it owed no duty to a third-party like plaintiff, and therefore cannot be held liable to him. In opposition plaintiff argues that under relevant law L&K can be held liable to a third-party because they created a dangerous condition through their work, that injured plaintiff.

While "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party", exceptions to the general rule exist (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136), including, as applicable here, that a contractor who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury (*id.* at 141-142 [internal citations omitted]).

Here, it is undisputed that L&K installed the flooring that caused plaintiff's fall, which is sufficient to render it potentially liable for having launched a force or instrument of harm (*Drummond v 450 Partners LLC*, 210 AD3d 494 [1st Dept 2022]). Also, even if the flooring was safe when installed, plaintiff's photographs taken minutes after the accident showed a rolled-

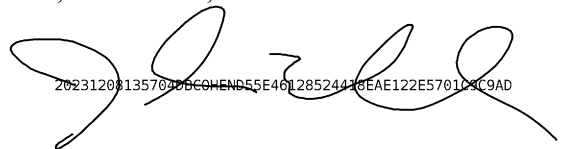
over carpet, which L&K agreed would not have been consistent with how it should have appeared if safely installed, and it therefore does not establish, prima facie, that it neither created nor exacerbated a dangerous condition (see *Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 455-456 [1st Dept 2018], *appeal withdrawn* 32 NY3d 1168 [2019]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion is granted to the extent of severing and dismissing plaintiff's Labor Law §§ 200 and 241(6) claims and denied as to plaintiff's common law negligence claim, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the parties appear for a settlement/trial scheduling conference on January 31, 2023 at 11 am, at 71 Thomas Street, Room 305, New York, New York.



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12/8/2023

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE