Rodney v 840 Westchester Ave., LLC

2024 NY Slip Op 34675(U)

October 15, 2024

Supreme Court, Bronx County

Docket Number: Index No. 23112/2019E

Judge: Laura G. Douglas

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SCANNED TO COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 6

Ruth Rodney,

Index №. 23112/2019E

LAURA G. DOUGLAS
Justice Supreme Court

-against-

Hon. _____
Justice Supreme Court

840 Westchester Ave. LLC, et al
and a Third-Party Action

The following papers numbered 1 to (3) were read on this motion (Seq. No. 6)
for Summary Judgment ~~noticed~~ submitted on September 19, 2023

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). (1)
Answering Affidavit and Exhibits	No(s). (2)
Replying Affidavit and Exhibits	No(s). (3)

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendants is decided in accordance with the attached memorandum Decision/Order

Dated:

Dated: 10-15-24

Hon. LGD
LAURA G. DOUGLAS
Justice Supreme Court
, J.S.C.

CHECK ONE..... ☑ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE

MOTION IS..... ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 23112/2019E

RUTH RODNEY,

Plaintiff,

-against-

840 WESTCHESTER AVE, LLC, 840 WESTCHESTER AVENUE NMA, LLC, 840 WESTCHESTER AVENUE NPPN, LLC, 840 WESTCHESTER AVENUE, NPPS, LLC, 840 WESTCHESTER HOLDINGS. LLC, and KIM CHANG HYUN,

Defendants.

840 WESTCHESTER AVE, LLC, 840 WESTCHESTER AVENUE NMA, LLC, 840 WESTCHESTER AVENUE NPPN, LLC, 840 WESTCHESTER AVENUE, NPPS, LLC, and 840 WESTCHESTER HOLDINGS. LLC,

Third-Party Plaintiffs,

-against-

CHILDREN'S HEALTH FUND, NEW YORK CHILDREN'S HEALTH PROJECT, and MONTEFIORE MEDICAL CENTER,

Third-Party Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J. S. C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of these motions for summary judgment (seq. no. 6):

Papers	**Numbered**
Notice of Motion by Defendants/Third-Party Plaintiffs 840 Westchester Avenue NMA, LLC, 840 Westchester Avenue NPPN, LLC, 840 Westchester Avenue NPPS, LLC, and 840 Westchester Holdings, LLC, Affirmation of Andrew W. Padover, Esq. dated August 3, 2023 in Support of Motion, Memorandum of Law by Andrew W. Padover, Esq. dated August 2, 2023 in Support of Motion, Statement of Material Facts by Andrew W. Padover, Esq. dated August 3, 2023, and Exhibits ("A" through "K")..... 1	
Affirmation of Steven Gershowitz, Esq. dated August 23, 2023 in Opposition	

to Motion, Counter-Statement of Material Facts by Steven Gershowitz, Esq. dated August 23, 2023, and Exhibits ("A" through "H")..... 2

Reply Affirmation of Andrew W. Padover, Esq. dated September 18, 2023..... 3

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendants/Third-Party Plaintiffs 840 Westchester Avenue NMA, LLC, 840 Westchester Avenue NPPN, LLC, 840 Westchester Avenue NPPS, LLC, and 840 Westchester Holdings, LLC (collectively, "840 Westchester") seek summary judgment pursuant to CPLR 3212 dismissing the plaintiff's action. The motion is granted.

The plaintiff ("Rodney") seeks monetary damages for personal injuries allegedly sustained on March 15, 2017 when she slipped and fell on a wet floor in a building lobby located at 840 Westchester Avenue in Bronx, New York. The 840 Westchester defendants owned and/or operated the building. Rodney worked on the building's second floor.

840 Westchester argues that it is entitled to summary judgment because it did not have actual or constructive notice of the purported hazard claimed to have precipitated Rodney's fall. 840 Westchester contends that she has provided no evidence that the condition which caused her accident was present long enough for 840 Westchester to have been made aware of it in time to eliminate the hazard that it posed. In any event, 840 Westchester maintains that it put in place reasonable safety measures in the form of floor mats. Finally, 840 Westchester notes that there was a storm in progress at the time of Rodney's accident, such that it cannot be liable for failing to eliminate water constantly tracked indoors during the storm.

In support of its motion, 840 Westchester relies on Rodney's own deposition testimony. In pertinent part, she testified that her accident occurred at approximately 8:00 a.m. in the building's first floor lobby. The lobby had only one entrance, which was via the building's front door. Rodney walked from the outside into the lobby through the front door and headed towards the elevator. At that time, she did not notice any wet spots on the lobby floor. She did see a sign that indicated that the elevator was not working and instructed her to use the stairs. Rodney then took approximately three to four steps towards the stairs and slipped and fell. She testified that it was snowing when her accident happened and that she had brushed off her shoes prior to her accident on the carpet located in the lobby. The carpet extended from the front door to the elevator. Rodney had been walking on the carpet prior to her

accident.

Rodney stated that she did not notice any wetness on the lobby floor before she slipped and fell. It was only after she was on the ground that she saw that the floor was wet with clear water. She did not know where the water came from, but did know that it was snowing outside at the time. Rodney also could not state how long that liquid had been present on the floor prior to her accident. She had never complained about wet spots on the lobby floor nor was she aware of anyone else making such a complaint.

840 Westchester also submits the deposition testimony of Jose Rodriguez ("Rodriguez"), its building superintendent. In pertinent part, Rodriguez testified that he had been the superintendent at the subject building for some eight years prior to the accident. He stated that the lobby has mats on the floor regardless of weather conditions. A person would immediately step onto the mat after entering through the front door. There are mats that lead directly to the elevator which are flush with the elevator doors, as well as a mat that specifically leads to the stairwell in the lobby. Rodriguez testified that one purpose for the mats was to prevent persons from slipping and falling in the lobby when it is wet. Rodriguez stated that he was not informed of this accident and was not aware of anyone else ever getting injured in the building. Finally, Rodriguez testified that he never received any complaints regarding the building's condition prior to Rodney's accident.

Finally, 840 Westchester relies on the deposition testimony of Joan Pierson ("Pierson"), a Human Resources Manager for third-party defendant Montefiore Medical Center, which employed Rodney and occupied space on the building's second floor. In pertinent part, Pierson testified that mats were present in the lobby throughout 2008-2017 when she worked there. She also recalled that it had been snowing on the day of Rodney's accident. In fact, it was Pierson's understanding that Rodney slipped on water that had been tracked indoors from the inclement weather. Pierson did not recall ever receiving a prior complaint about persons slipping in the lobby due to inclement weather having created a slippery floor. She was not aware of any Montefiore employees ever telling her prior to Rodney's accident that they had slipped in the lobby.

In opposition, Rodney argues that a material issue of fact remains to be decided by a jury as to whether 840 Westchester was aware of a recurrent hazard posed by water accumulating in its lobby, which it failed to address. In addition, Rodney contends that 840 Westchester disregarded its own custom and practice by failing to place mats on the lobby floor on the morning of Rodney's accident

where they knew that melted snow would accumulate – the spot where Rodney fell. Since the elevator was not working at the time, 840 Westchester redirected Rodney to walk upon the hazardous, uncovered wet and slippery area of the lobby. Rodney also contends that 840 Westchester failed to set out warning cones and failed to dry the accumulating water. Rodney notes that there is no evidence of the last time that the lobby had been cleaned or inspected prior to Rodney's accident, since Rodriguez did not testify as to same. For these reasons, Rodney contends that summary judgment is not warranted.

Rodney notes that she actually testified that she did not recall if it was actively snowing that morning. She does admit that there was snow on the sides of roadways and sidewalks that day, including on the roadway in front of the building. She further testified that there was no welcome mat at the front door, but that she brushed off her shoes anyway. She also stated that the long carpet in the lobby was not always there. Finally, Rodney notes her testimony that there was no sign in the lobby cautioning that the floor was wet.

Rodney also notes that Rodriguez testified that there was no welcome mat at the front door. Rodriguez also stated that the lobby floor is made of smooth tile. He acknowledged that it gets slippery when wet, which is part of the reason for the mats. Rodney notes that Rodriguez acknowledged that he was supposed to place "wet floor" signs and dry any wet areas when there was snow. He would generally place some 10 'wet floor" signs in the lobby whenever it rained or snowed, but he did not know if any such signs were in the lobby on the accident date. Rodriguez would also use a mop and bucket to dry the floor, but did not recall if he did so on the accident date. Rodriguez also did not recall whether it had snowed or rained that morning.

Rodney also points out that Pierson testified that yellow warning signs would be placed in the lobby during inclement weather, but did not recall any such signs on the accident date. Pierson also noted that the lobby floor would sometimes get slippery during inclement weather and that there were portions of the floor from the front door to the stairs that were not covered by the mat. Pierson also testified that she herself slipped in the lobby prior to Rodney on the same morning because there was no mat in that area. Two other people identified by Pierson had told her on the morning of Rodney's accident prior to her fall that the lobby floor was slippery in an area not covered by the mat. Rodney also notes that Karen Redlener, the founder of the entity that subleased Montefiore's space, testified that the lobby floor would get wet and slippery whenever it rained or snowed.

Finally, Rodney relies on a Certified Weather Report for New York City's Central Park that

reveals no snowfall on the accident date and 7.6 inches of snowfall on the previous day. From this, Rodney concludes that there was no storm in progress at the time of her accident.

To obtain summary judgment, 840 Westchester must demonstrate that there are no material issues of fact in dispute and that they are entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). To defeat such a showing, Rodney must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists precluding summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]).

In this case, 840 Westchester must establish that it maintained its premises in a reasonably safe manner and that it did not create a dangerous condition which posed a risk of foreseeable harm to persons expected to be present on the premises (*see Westbrook v. WR Activities-Cabrera Markets*, 5 AD3d 69 [1st Dept 2004]). In a slip and fall action, the defendants have the initial burden of establishing that they did not create the alleged hazardous condition and lacked actual or constructive notice of its existence (*see Rodriguez v. 705–7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 [1st Dept 2010]). A lack of actual notice can be demonstrated by testimony that no complaints about the location were received before the accident, and that there were no prior incidents in that area prior to the plaintiff's fall (*see Frederick v. New York City Hous. Auth.*, 172 AD3d 545 [1st Dept 2019]). Constructive notice usually exists when the allegedly hazardous condition is visible, apparent, and exists on defendant's premises for a period sufficient to give the defendant an opportunity to discover and remedy it (*see Ross v. Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). Constructive notice can also be established by evidence that a recurring dangerous condition existed in the area of the accident that the defendant routinely left unaddressed (*see Uhlich v. Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107 [1st Dept 2003]). A defendant can satisfy its burden of showing that it lacked constructive notice by submitting evidence of its maintenance activities on the accident date and that the alleged condition did not exist when the area was last inspected or cleaned prior to the plaintiff's accident (*see Velocci v. Stop & Shop*, 188 AD3d 436 [1st Dept 2020]). When a defendant fails to meet its initial burden to show that it did not cause, create, or have actual or constructive notice of the alleged condition, the burden does not shift to the plaintiff to raise a triable issue of fact (*see Hill v. Manhattan N. Mgt.*, 164 AD3d 1187 [1st Dept 2018]).

Here, 840 Westchester met its *prima facie* burden by demonstrating that it had been snowing at the time of Rodney's accident, that it had placed mats on the lobby floor, that it did not create the wet condition, and that it had neither actual notice of the hazard that caused Rodney's fall – in the form of any complaints – nor constructive notice of this particular wet spot (*see Gonzalez-Jarrin v. New York City Department of Education*, 50 AD3d 334 [1st Dept 2008]). Rodney's testimony that she did not see the water before she fell indicates that this condition was not visible and apparent and could not charge 840 Westchester with constructive notice (*see Polanco v. Newmark & Company Real Estate, Inc.*, 172 AD3d 602 [1st Dept 2019] and *Richardson v. S.I.K. Associates, L.P.*, 102 AD3d 554 [1st Dept 2013]).

In response, Rodney failed to raise an issue of fact, since there is no evidence of how long the condition had existed before she slipped (*see DeCongelio v. Metro Fund, LLC*, 183 AD3d 449 [1st Dept 2020] and *Garcia v. Delgado Travel Agency*, 4 AD3d 204 [1st Dept 2004]). Since this spot of water could have been tracked in by recent pedestrian traffic given the snow and slush outside (which was Pierson's conclusion) or by Rodney herself, there is no basis to conclude that 840 Westchester was aware of this specific hazard in time to safeguard the area. 840 Westchester was under no duty to cover the entire lobby floor with mats and to continuously mop all of the water that had been tracked in (*see Garcia v. Delgado Travel Agency Inc.*, 4 AD3d 204 [1st Dept 2004]). That the mats may have left some areas of the lobby floor uncovered is insufficient to rebut the showing made by 840 Westchester because the law imposes only a duty to take reasonable measures and the failure to take any particular precaution (such as placing a certain number of mats in specific locations), even if customary, cannot serve as the basis for liability (*see Toner v. National Railroad Passenger Corporation,* 71 AD3d 454 [1st Dept 2010]) (disputes over whether it was raining at the time of the accident and whether warning signs were displayed were insufficient to defeat summary judgment).

While the weather report submitted by Rodney indicates that it was not snowing in Central Park at the time of Rodney's accident, Pierson testified that it was snowing miles away in The Bronx, as did Rodney (*see* Rodney deposition transcript, p. 140, ll. 9-17). Even if it was no longer snowing, Rodney and the other deponents agree that there was still snow outside, making it inevitable that persons entering the lobby would continuously track moisture onto the floor. 840 Westchester demonstrated that it took reasonable maintenance measures to address the wet condition by laying out mats in the lobby, which were not always present according to testimony (*see O'Sullivan v. 7-Eleven, Inc.*, 151 AD3d 658, 659 1st Dept 2017] ("[t]he fact that it was snowing, with water and slush tracked in, does not constitute notice

of a particular dangerous situation, warranting more than the laying of floor mats) and *Garcia v. Delgado Travel Agency*, 4 AD3d 204 [1st Dept 2004]). That water would be tracked inside and accumulate on the lobby floor whenever it rained only made 840 Westchester generally aware that the floor would get wet during inclement weather and does not demonstrate constructive notice of the specific condition that caused Rodney's fall (*see Rodriguez v. 520 Audubon Associates*, 71 AD3d 417 [1st Dept 2010]).

Accordingly, it is hereby

ORDERED that the plaintiff's complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court make all entries necessary to effectuate the terms of this Order, including entry of judgment(s) of dismissal.

The foregoing constitutes the Decision/Order of this Court.

DATED: October 15, 2024
Bronx, New York

HON. LAURA G. DOUGLAS
J.S.C.