Green v Gracie Muse Rest. Corp.
2012 NY Slip Op 31792(U)
July 2, 2012
Sup Ct, New York County
Docket Number: 105146/09
Judge: Joan A. Madden
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SCANNED ON 7/10/2012
[* 1]

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

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 105146/2009
GREEN, BARBARA
vs
GRACIE MUSE RESTAURANT CORP.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE 3-29-12
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUL 10 2012
NEW YORK COUNTY CLERK'S OFFICE

Dated: July 2 2012

______ **J.S.C.**

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

---X

BARBARA GREEN,

Index No. 105146/09

Plaintiff,

-against-

GRACIE MUSE RESTAURANT CORP.,

Defendant.

---X

FILED
JUL 10 2012
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.

In this personal injury action, defendant Gracie Muse Restaurant Corp. ("Gracie Muse"), which operates the Gracie Muse Restaurant located at 80th Street and First Avenue in Manhattan, moves for summary judgment dismissing the complaint against it. Plaintiff Barbara Green ("Green") opposes the motion, which is denied for the reasons set forth below.

Background

Green alleges that she was injured on September 13, 2008, at approximately 4:00 p.m., when she slipped and fell on the tile in the hallway near Gracie Muse's restroom and kitchen. Green testified at her deposition that she and her friend, Sandra Bennett ("Bennett"), had finished brunch, paid, and were heading to the restroom before leaving Gracie Muse (Green dep. at 39, 46, 49). She testified that while walking on the tile in the hallway near the restroom and kitchen, her right foot slipped forward (Id. at 54-55), she fell forward (Id. at 54) and went straight to the floor on her left knee (Id. at 57). She also testified that the following day she saw a white colored, shiny substance on the soles of her shoes which looked greasy (Id. at 98), and that this was the first time that she had seen the soles of her shoes since the time of the accident (Id. at 97). She testified that she had seen the top portion of her shoes at the time of the accident and did not notice any wetness or foreign substance (Id. at 83). Green did not remember feeling

any wetness or sticky substance on her jeans after the accident and could not remember if she felt any wetness or sticky substance beneath her (Id. at 83). Green also testified that she had been to the same restroom at least 45 minutes before she fell and that she had not noticed any dirt or debris on the floor, and did not slip, or complain to the staff about the condition of this area (Id. at 51-53).

Gerassimos Georgotas ("Georgotas"), a manager for Gracie Muse, who was on duty at the time of the accident, was also deposed. Georgotas testified that the floor tiles outside of the restroom were in place for approximately 6-7 years before the accident, (Georgotas dep. at 8-9), and that they are typically mopped by a dishwasher at approximately 1:00-2:00 PM each day. (Id. at 10). He also testified that it was his job to inspect the diner for debris and liquid. (Id. at 17). Georgotas testified that he did not receive any complaints about any spills or debris in the hallway near the restrooms on the accident date (Id. at 14-15), and that the floors were cleaned around 2:00 PM on that date but he did not know who cleaned them (Id. at 24). He later testified that he had no independent recollection of seeing anyone clean the floors that day (Id. at 23). Georgotas testified that he did not witness the accident, but that he called 911 (Id. at 19), and that there was no video surveillance in the restaurant at the time of the accident (Id at 15).

Cindy Victoria ("Victoria"), a cashier and hostess at Gracie Muse, who was on duty at the time of the accident, testified that she was not aware of any complaints regarding the restaurant's floor on the day of the accident (Victoria dep. at 18). Victoria testified that she went to help Green after learning of the accident (Id. at 9), but that Green had already fallen ad was lying on the floor by the time she got over there (Id. at 11). She further testified that she was the one who phoned 911, (Id. at 12), that there was video surveillance in the restaurant, (Id. at 25), and that the manager keeps cleaning records (Id. at 16).

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Gracie Muse moves for summary judgment dismissing the complaint against it on the grounds that (1) Green is unable to identify the condition that caused her accident; (2) the unspecified defective condition is not a statutory violation; (3) Gracie Muse did not have actual or constructive notice of the alleged unspecified defective condition.

Plaintiff opposes the motion, asserting that she sufficiently identified the dangerous condition that caused her to fall as a foreign substance on unsafe and slippery tiles. In support of her opposition, plaintiff submits a report from Douglas N. Sickles, P.E. ("Sickles"), an engineer from Heimer Engineering, P.C., who examined the condition of the floor in the area of Green's accident. Sickles measured the coefficient of friction (COF) of the floor tiles where Green fell as being between 0.3 and 0.35, which he finds to be below the minimum safe COF for a dry walking surface is 0.5. (Professional Engineer's Report at 4, 6). Sickles opines that having flooring with such a low coefficient of friction is unsafe for walking and produces "a situation which is ripe for a slip and fall incident to occur." (Id. at 6).

On the subject of notice, Green asserts that Georgotas's testimony that the floor was mopped at around 2:00 PM and his later claim that he had no independent recollection of whether the floor was mopped raises a question of fact as to when the area was last maintained by Gracie Muse. In addition, Green asserts the discrepancy between the testimony of Victoria and Georgotas with regard to the existence of video surveillance tapes and cleaning records also raises an issue of fact.

In reply, Gracie Muse submits an affidavit from Scott E. Derector, P.E. ("Derector"), an engineer from Affiliated Engineering Laboratories Inc., who, on July 30, 2010 examined the condition of the floor in the area where Green fell. Derector reported that he performed a dry slip resistance test in the vicinity of the accident location and calculated the COF in this area to

be 0.6 for the dry surface, which he finds to be above the standard minimum safe COF value for dry walking surfaces of 0.5. (Affidavit of Derector ¶ 8, 9).

Gracie Muse also argues that the issue of whether it maintained cleaning records is irrelevant as Green testified that the floor was clean less than an hour before she fell, and that Gracie Muse has provided all discoverable information in this action.

In her sur-reply,[1] Green asserts that disagreement between the parties' experts as to whether the floor in question is safe or not creates issues of fact to be determined at trial

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. . . ." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 324 (1986).

As a preliminary matter, summary judgment is not warranted on the ground that Green did not adequately identify the cause of her to fall. A plaintiff is not required to identify at the time of the accident "the precise condition that caused her to fall." Tomaino v. 209 E. 84th Street Corp., 72 A.D.3d 460, 461 (1st Dept. 2010). Here, even assuming *arguendo* that Green's testimony that she did not notice any wetness, stickiness or other foreign substance on or around her at the time of the accident was sufficient to make a prima facie showing entitling Gracie Muse to summary judgment, Green has controverted this showing by identifying the cause of her

[1] As Gracie Muse submitted its expert affidavit in its reply papers, Green was permitted to submit a sur-reply.

fall as slippery tiles, which is supported by evidence that there was grease on the soles of her shoes after she fell, and the opinion of her expert that the tiles did not have adequate slip resistance.

Moreover, while Gracie Muse's submits an affidavit from its expert asserting that the tiles were sufficiently slip resistant, this opinion does not provide a basis for granting summary judgment in Grace Muse's favor as contradictory expert evidence requires the fact-finder to evaluate such evidence and make judgments about the credibility of the experts. See Carpino v. Baker, 66 A.D.2d 201, 204 (1st Dept. 1979) ("The weight to be accorded the expert's testimony was a matter for the jury, not the court . . . .")

The next issue is whether there is a basis for finding that Grace Muse violated a duty to Green such it can be held liable for the injuries she suffered as a result of the allegedly dangerous condition of the floor. "It is well established that a landowner (possessor of property) is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk." O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dept. 1996). For an owner to be held liable, it must be shown that "the owner or possessor either created the condition, or ha[d] actual or constructive knowledge of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 A.D.2d 572, 573 (2d Dept. 2000).

Here, there is no evidence that Gracie Muse created the condition that caused Green to fall, or that it had actual notice of it. At issue, then, is whether Gracie Muse had constructive notice of the slippery floor. Constructive notice requires that a hazard be "visible and apparent and . . . exist for a length of time prior to the accident sufficient to permit defendant's employees

to discover and remedy it." Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986); Planatamura v. Penske Truck Leasing, 246 A.D.2d 347 (1st Dept. 1998).

On a motion for summary judgment, the movant has the burden of demonstrating "the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed." Giuffrida v. Metro North Commuter R.R. Co., 279 A.D.2d 403, 404 (1st Dept. 2001). Thus, "[o]nly where the record is 'palpably insufficient' to establish constructive notice 'that the condition existed for a sufficient period to afford the [defendant], in the exercise of reasonable care, an opportunity to discover and correct it' can it be said that there is no factual issue to submit to the trier of fact." Giambrone v. New York Yankees, 181 A.D.2d 547, 548 (1st Dept. 1992) (quoting Lewis v. Metropolitan Transp. Auth., 99 AD2d 246, 251, (1st Dept. 1984) aff'd 64 N.Y.2d 670 [1984]).

Here, while Gracie Muse submits certain evidence regarding its general practices and procedures for inspecting and mopping the restaurant, such evidence is insufficient to make a prima facie showing that it lacked constructive notice of a slippery condition in the hallway near the restroom. In fact, while Georgotas testified that the floors "were typically mopped" between 1:00-2:00 pm each day, he later conceded that he could not recall whether the floor had been cleaned on the date of the accident. Furthermore, his testimony is not supported by cleaning records or other evidence verifying when the accident site was last checked or cleaned on the accident date. Thus, Gracie Muse has not met its burden of showing that the condition did not exist for a sufficient amount of time for Gracie Muse's employees in the use of reasonable care to discover it. Porco v. Marshalls Dept. Stores, 30 A.D.3d 284 (1st Dept. 2006)(testimony of defendants' store manager that the store was cleaned daily, that it was the responsibility of the employees to clean up as needed, and that he walked around the aisles on a regular basis, did not

entitled defendants to summary judgment in the absence of evidence as to how often the aisles were checked or about the activities of the employees on the date in question); Deluna-Cole v. Tonali, Inc., 303 A.D.2d 186, 186 (1st Dept. 2003) (holding that defendant restaurant was not entitled to summary judgment based on hostess' testimony that her duties included "'walking around the restaurant looking for hazardous conditions' and that the head of the busboys is in charge of cleaning the restaurant . . . simply do not address . . . when the passageway where plaintiff fell . . . was last checked for spills . . . ."); Edwards v. Wal-Mart Stores, Inc., 243 A.D.2d 803 (3d Dept. 1997) (in action where patron slipped in a puddle of water outside the restroom defendant department store was not entitled to summary judgment based on testimony that it was the "general practice" of the store to inspect the area around the restroom every half hour).

Finally, the opinion of Green's expert that Gracie Muse violated New York City Administrative Code §§ 27-127 and 27-128 does not provide a basis for finding that Gracie Muse was negligent. See e.g., Dixon v. Nur-Hom Realty Corp., 254 A.D.2d 66, 67 (1st Dept 1998) (noting that "the alleged violation of the general duty of maintenance and repair set forth in Administrative Code §§ 27–127 and 27–128 is insufficient as a basis for liability"). However, whether Gracie Muse is in compliance with the Administrative Code is not determinative of the issue of whether it breached its common law duty to maintain the restaurant in a reasonably safe condition. Kellman v. 45 Tiemann Associates, Inc., 87 N.Y.2d 871, 872 (1995)(finding that landlord's "alleged compliance with the applicable statute and regulations is not dispositive of the question of whether it satisfied its duties under the common law"); Swerdlow v. WSK Properties Corp., 5 A.D.3d at 588 (although building did not fall within the purview of the building code, the owner and possessor of the property still owed a duty to

maintain the property in a reasonably safe condition). Here, as indicated above, there are issues of fact as to whether Gracie Muse breached its common law duty to maintain the restaurant in a reasonably safe condition, and therefore summary judgment must be denied.

Conclusion

In the view of the above, it is

ORDERED that the motion for summary judgment by defendant Grace Muse Restaurant Corp. is denied.

Dated: ~~June~~ July 2, 2012

J.S.C.