

Miles v Twenty Ones Inc.

2008 NY Slip Op 32019(U)

July 16, 2008

Supreme Court, New York County

Docket Number: 0104648/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHÉ, J.S.C.

PART _____

Index Number : 104648/2006

MILES, NISHELLE

VS.

TWENTY ONES

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

JUL 18 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/14/08

JUDITH J. GISCHÉ, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
NISHELLE MILES,
Plaintiff,

Index No.: 104648/06
Seq. No. : 001

-against-

TWENTY ONES INCORPORATED d/b/a
40/40 CLUB,

Present:
Hon. Judith J. Gische
J.S.C.

Defendant.
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Def's motion [sj] w/JPC affirm in support, DG affid.	1
Pltf's TAN affirm in opp, exhs	2
Def's JPC reply affirm, exh	3
Transcript 5/15/08	4

FILED
JUL 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action by plaintiff Nishelle Miles ("Miles" or plaintiff) arising from a slip and fall. Defendant Twenty Ones Incorporated d/b/a 40/40 Club (the "Club" or defendant") now moves for summary judgment against plaintiff. Plaintiff opposes the instant motion.

Issue has been joined and since the motion was brought timely after the note of issue was filed, it will be considered on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

On September 17, 2005, at approximately 11:30pm, Miles slipped and fell on a

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wood floor in the "Cigar Room" of the Club, which is a sports bar (the "accident").¹ In her bill of particulars, Miles alleges that the defendant "created a dangerous and defective condition on the floor, by allowing debris to remain on the ground of said premises which debris was slippery; in failing to remove said debris from the floor...; in failing to warn plaintiff in particular and the public in general of the aforesaid dangerous and hazardous condition; in failing to provide safe passageway for the plaintiff in the [Club]; in failing to keep said premises clean and free of debris; and in failing to take any or adequate precautions to insure plaintiff's safety while in said premises."

Miles testified at her deposition as follows. Miles claims that she slipped on "[s]omething very slippery" and "fell forward." At the time of her fall, Miles was "wearing a two inch, two-and-a-half-inch heel." After her fall, she noticed a 15-18 inch puddle of "some sort of substance" that was "very wet" and "slick." Miles also testified as follows regarding the puddle:

Q Did this area have a color?

A No. It didn't have a color.

Q What was the color of the floor generally, all over the floor?

A It was a beach [sic], very light wood floor.

Q And this area had no color? In other words, it still showed as sort of a beach [sic] wood floor?

A To me, yes.

¹ Defendant's Director of Operations, Desiree Gonzalez ("Gonzalez"), testified that the room where plaintiff's accident occurred is actually called the Cognac Lounge, but that people sometimes called this room the Cigar Room because cigars are sold there. Nonetheless, this room will be referred to as the Cigar Room herein.

There were several other people in the Cigar Room, when Miles fell, including William Stevenson ("Stevenson"). Miles knew Stevenson because he went to school with one of Miles' brothers. After she fell, Stevenson told Miles that he had told the bouncer and the person managing the Cigar Room "to clean the floor because it was slippery", more than once, and that several "other people had slipped on the same area."

On September 21, 2005, at the Total Health Clinic where Miles received physical therapy for her injuries arising from the accident, Miles completed a medical questionnaire wherein she wrote: "I slipped on a hard wood floor in a seated lounge. The floor [surface] was not wet, but there was wax on the floor."

At the time of the accident, Gonzalez was responsible for the day-to-day operations of the Club. Gonzalez responded to the scene of the accident after she learned that Miles fell. Gonzalez testified as follows:

- Q. How long were you with Ms. Miles in the area of the mezzanine?
- A. We were probably there for about 10 minutes just – I told her, we were telling her, you know, it looks fine, if you want to go to the dentist you can send us your bill, we'll take care of your dental bill. If you want to go to the hospital we will call an ambulance. She was like, no, I'm fine, I'm fine. Her mom or who I think is her mom, that older lady was kind of patting, consoling her, telling her it was okay. Then her – what I now know to be her father or I knew then after she came in, her father and other family members came into the area.

Gonzalez also testified that Juan Vargas ("Vargas"), a busser, worked in the Cigar Room. Gonzalez claimed that Vargas observed the accident and told her that Miles "fell, that something was wrong with [Miles'] shoe and that [Miles] dropped her drink."

Gonzalez further testified that as a matter of standard procedure, when a spill was reported, a busser would clean up the area within five minutes or less and put up a "wet floor sign." Gonzalez also prepared an incident report with her account of the events which occurred after the accident, wherein she stated that Miles fell because of new shoes. In Gonzalez' affidavit, she stated that on the date of the accident, she never received any complaints that the floor in the Cigar Room was slippery.

Vargas testified as follows:

Q. ... when you first saw the [Miles fall], immediately before her fall, you were opening the door; is that correct?

A. Yes.

Q. And could you tell me, for the record, exactly what you saw?

A. When she screamed, I turned, and she was falling as if she were dancing, she was falling.

Q. Did you immediately go to her to see her?

A. Yes.

Q. Did you notice that the floor was wet in any way?

A. No, no, because the drink that she had, didn't fall.

Q. Did you notice that the floor was slippery in any fashion where she fell?

A. No.

Q. Do you know what caused her to fall?

A. It was probably her shoes.

The Club argues that it is entitled to summary judgment because: [1] Miles is unable to identify the alleged defect or condition which was the proximate cause of her

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injury; and [2] Miles is unable to demonstrate that the Club had actual or constructive notice of a dangerous condition.

Miles contends that during her deposition, she clearly identified the dangerous condition that caused her fall, and that the unsworn medical questionnaire which Miles filled out "does not render plaintiff's testimony incredible as a matter of law" (internal quotations omitted). Miles has also provided the affidavits of Danielle Wingfield, Janice Wingfield, and William Stevenson, who allegedly witnessed the accident and state that the floor was wet at the time of the accident. Miles also argues that the defendants have not offered any evidence to establish when the area where her accident occurred was last inspected, maintained, cleaned or otherwise observed on the date of the accident. Miles also contends that the incident reports are unsworn statements and thus are inadmissible.

Discussion

The moving party seeking summary judgment has the initial burden of proving its *prima facie* case. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if the moving party meets its initial burden of proving that it is entitled to summary judgment, as a matter of law, will the burden then shift to the opponent who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). Granting a motion for summary judgment is the functional equivalent of a trial, therefore, it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977).

A plaintiff in a slip and fall case must establish that the defendant either created the condition that caused the accident or that it had actual or constructive notice of the dangerous condition. Gordon v. American Museum of Natural History, 67 NY2d 836 (1986). The issue of whether a dangerous or defective condition exists usually depends on the peculiar facts and circumstances of each case and is generally an issue of fact. Trincere v. County of Suffolk, 90 NY2d 976 (1997).

The court rejects the Club's argument that the inconsistency between Miles' deposition testimony and the unsworn medical questionnaire about the exact nature of the floor is a basis to dismiss plaintiff's complaint. Although her deposition testimony and the statement in the medical questionnaire about what caused the slippery condition differ, Miles has consistently maintained that the floor was slippery, which contributed to her fall. Moreover, Miles' deposition testimony was consistent with all prior pleadings. A reasonable jury could conclude that Miles has established that the floor was wet at the time of her fall, and that the wetness was a proximate cause of her fall. At most, defendant has only established that plaintiff's prior statement on this point is inconsistent. The inconsistent statement merely raised an issue of credibility. Nova v. K & B Furniture Co., Inc., 262 A.D.2d 243 (1st Dept. 1999). *Compare*: Duncan v. Toles, 21 AD3d 984 (2nd dept. 2005); Williams v. Dover Home Improvement, 276 AD2d 626 (2nd dept. 2000). Therefore, this argument, is not a basis to grant defendant's motion.

There are also genuine triable issues of fact as to whether the Club had actual and/or constructive notice of the alleged dangerous condition. Stevenson states in his affidavit that at least one hour prior to Miles' accident, when "he went to sit down [in the Cigar Room], the floor was so slick that the chair literally slid right out from under him,

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nearly causing him to fall to the ground.” Stevenson claims that he immediately notified a bouncer and a waitress, each employed by the Club, of the “wet, slick and slippery nature of the hardwood floor.” Stevenson claims that despite such notice, no one cleaned the hardwood floor area where Miles subsequently fell. This evidence is sufficient to demonstrate that the Club received actual notice of the alleged dangerous condition. Moreover, a reasonable jury could conclude that defendant had constructive notice that the floor was wet and/or slippery. Therefore, even if the Club had met its burden on this motion, there are several triable issues of fact which preclude summary judgment. Thus there is enough evidence for the jury to decide these issues.

Conclusion

Defendant has failed to establish the absence of any triable issue of fact. Even if defendant had met its burden, plaintiff has demonstrated, by admissible evidence, facts which could lead a jury to conclude that the alleged accident was caused by a dangerous condition and that defendant had actual and/or constructive notice of the alleged defect. Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision on the office of trial support so that it may be scheduled for trial and assigned.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
July 16, 2008

So Ordered

HON. JUDITH J. GISCHE, J.S.C.

FILED

JUL 18 2008

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