Ortiz v All Lock & Glass Serv., Inc.
2012 NY Slip Op 33775(U)
December 21, 2012
Supreme Court, Kings County
Docket Number: 9052/10
Judge: Larry D. Martin
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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of December, 2012

PRESENT:

HON. LARRY D. MARTIN,
Justice.

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ROBERTO RAMOS ORTIZ,

Plaintiff,

- against -

Index No. 9052/10

ALL LOCK & GLASS SERVICE , INC., 28-90 REVIEW AVENUE ASSOCIATES, LLC.,

Defendants.

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ALL LOCK & GLASS SERVICE, INC.,

Third-Party Plaintiff,

- against -

(Index No. 75424/11)

SATELLITE AUTO GLASS INC.,

Third-Party Defendant.

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6, 7, 8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant/third-party plaintiff All Lock & Glass Service, Inc., ("All Lock") moves for an order, pursuant to CPLR 3212, granting summary judgment

dismissing plaintiff's complaint and all cross-claims asserted against it. Defendant 28-90 Review Avenue Associates, LLC ("28-90 Review") cross-moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it.

Factual Background

The instant action arises out of an accident which occurred on January 15, 2009, when the plaintiff Roberto Ramos Ortiz ("plaintiff") sustained injuries while working in a garage/building located at 28-90 Review Avenue in Long Island City, New York. Defendant 28-90 Review, the owner of the premises, leased the subject building/garage to non-party AA Trucking Rental Corporation ("AA Trucking"), which operated a repair shop for trucks. At the time of the incident, the plaintiff was employed by AA Trucking. During his deposition, plaintiff testified that part of his duties at AA Trucking involved cleaning up inside the garage repair shop as well as the outside areas, and picking up materials (miscellaneous truck parts and tires) the mechanics left behind. Plaintiff additionally stated that his duties included taking deliveries, getting parts for the trucks, and performing snow removal on the premises when needed. According to plaintiff, AA Trucking had approximately 25 trucks at the subject location that would occasionally need repairs which typically took place in the garage repair shop area.

Plaintiff testified that on the morning of the accident, when he arrived at work, he noticed that it was very cold outside and that there was snow on the ground. According to plaintiff, it began to snow in the afternoon on the day before the accident occurred. After arriving at the shop, the plaintiff began sweeping the floor, dusting tables and picking up tools inside the garage. At some point that morning, an AA Trucking supervisor asked the plaintiff to run an errand to get some parts for a truck. In order to pick up the parts, the

plaintiff had to use the company van, which was parked on the side of the building near an area where dumpsters were located. As the plaintiff walked outside toward the van, he claims that he slipped on what he described as a mound of snow covering glass, thereby causing him to fall backwards on top of the glass. Plaintiff alleges that he sustained various injuries as a result of his fall.

Plaintiff testified that two days before the accident occurred, he observed a glass company (which was later identified as All Lock) replacing a glass windshield on a truck. Plaintiff recalled that the windshield repair work was being done inside the garage. Although plaintiff stated that the glass company would usually place the discarded old windshields in the dumpsters located on the side of the building, he admitted that he did not see what the glass company had done with the old windshield that it removed from the truck. Plaintiff additionally testified that on the day before the accident occurred he did not see any glass on the ground near the dumpsters.

On or about April 5, 2010, the plaintiff commenced the instant action against All Lock and 28-90 Review for personal injuries alleging causes of action in common-law negligence and for violations of § 200, § 240(1) and § 241(6) of the Labor Law. Defendants each interposed an answer denying the allegations. On or about June 13, 2011, All Lock commenced a third-party action naming third-party defendant Satellite Auto Glass, Inc. Discovery has been completed and a note of issue was filed on November 16, 2011. All Lock and 28-90 Review separately seek an order granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against them. The court notes that, in his Affidavit in Opposition, the plaintiff has withdrawn his claims for Labor Law §§ 240(1) and 241(6) and 200. As such, the court will only address plaintiff's common-law negligence

claims against All Lock and 28-90 Review in their respective summary judgment motion and cross motion.

All Lock's Motion for Summary Judgement

All Lock argues that it is entitled to summary judgment dismissing plaintiff's common law negligence claim since it was neither the owner of the premises nor did it create the condition (snow-covered glass windshield) that allegedly caused the plaintiff to slip and fall. In support of this contention, All Lock has submitted the deposition testimony of Carlos Chuchuca, who testified on behalf of All-Lock. Chuchuca testified that, during the relevant time period, All-Lock had a longstanding business relationship with AA Trucking for many years repairing glass windshields on various trucks at the subject location. Chuchuca admitted that he was at the subject premises two days before the accident, on January 13, 2009, and replaced a windshield on a small truck inside of AA Trucking's garage shop. However, Chuchuca claimed that he did not leave the old windshield on the ground by the dumpster. Instead, he placed the old windshield in his truck and took it with him when he left the premises. Chuchuca explained that he always took the old glass windshield with him and never placed it near the dumpsters where the plaintiff's accident occurred.

All Lock also refers to the deposition testimony of the plaintiff. Although the plaintiff testified that he saw the glass company, which was later identified as All Lock, replacing the front windshield of a truck two days before the accident occurred, he himself admitted that he did not know what happened to the windshield or where it was placed after it was removed (Plaintiff's Dep. Transcript, at 42-43). Plaintiff further testified that, at some time during the two days preceding his accident, he was in the area around the dumpster where the glass was supposed to be discarded and he did not see any windshields.

All Lock additionally refers to the deposition testimony of Sam Maurer, who was employed by AA Rental as an IT Manager, and also employed by 28-90 Review, the owner of the premises, as an Assistant Secretary. Maurer testified that he never observed any windshield glass discarded in or near the dumpsters on the premises and that other companies kept trailer cab truck attachments on the premises (Maurer Dep. Transcript, at 40-42). Maurer stated that some companies had their own trailers and rented only the cabs from AA Trucking, while other companies had their own cabs and rented the trailers from AA Trucking. More, importantly, Maurer testified that those companies were not required to use All Lock to replace the windshields on their vehicles. All Lock therefore maintains that there is no definitive evidence establishing that it in fact placed the windshield on the ground near the dumpster where the accident occurred, and that another glass company could have created the alleged dangerous condition.

In opposition to the motion, the plaintiff maintains that All Lock negligently failed to properly discard or take away the old glass windshield that it removed from the truck it repaired two days before the accident, and therefore is responsible for creating the dangerous condition which caused his injuries. Plaintiff points to his own deposition testimony that All Lock replaced a truck windshield two days before the accident and that it customarily discarded the old windshields in the dumpsters located on the side of the building. Plaintiff additionally relies upon the deposition testimony of Anthony Delgado, an AA Trucking supervisor, who also testified that All Lock would usually discard the glass windshields in the dumpster on the premises. According to Delgado, it was not until after the plaintiff's accident occurred that All Lock's employees started taking the windshields with them. Plaintiff therefore argues that the foregoing evidence raises an issue of fact as to whether All Lock was responsible for creating the alleged dangerous condition which caused his injuries.

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]. The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (*see Zuckerman v City of New York*, 49 NY2d 557[1980]).

Here, the court finds that All Lock has met its burden of proof by submitting competent evidence establishing that it did not place any discarded glass windshields on the ground near or at the dumpster location where the plaintiff's accident occurred. In opposition, the plaintiff has failed to raise an issue of fact establishing otherwise. Indeed, although it is undisputed that All Lock was present at the site two days before plaintiff's accident to change a windshield, there is no testimony that anyone witnessed an All Lock employee place the old glass windshield in the area where the accident took place. Moreover, Maurer's testimony established that the companies that rented both the cabs as well as the trailers were not required to use the same glass company specified by AA Trucking to do windshield repair (Maurer Dep. Transcript, at 42-43). Furthermore, there is no evidence that anyone noticed any discarded glass in the dumpster area prior to the plaintiff's accident (*see Bernstein v City of New York*, 69 NY2d 1020, 1021–1022 [1987] [where an accident may be caused by several possibilities, and where one or more cannot be traced back to the defendant, the plaintiff may not recover without sufficient proof that the defendant was liable]).

Plaintiff's contention that All Lock failed to properly dispose of the glass windshield that it changed two days before the incident occurred is premised solely on surmise and

conjecture. Indeed, under the circumstances of this case, it would be mere speculation to conclude that the allegedly dangerous condition which caused the plaintiff to slip and fall was caused by any affirmative act of negligence by All Lock (*see John v Tishman Constr. Corp. of N.Y.*, 32 AD3d 458 [2006]; *Kleeberg v City of New York*, 305 AD2d 549 [2003]; *Breuer v Wal-Mart Stores*, 289 AD2d 276 [2001]). It is well settled that "[s]peculation and surmise are insufficient to defeat a motion for summary judgment" (*Skouras v New York City Tr. Auth.*, 48 AD3d 547, 548 [2008]; *see Cusack v Peter Luger, Inc.*, 77 AD3d 785, 786 [2010]; *Cohen v Schachter*, 51 AD3d 847 [2008]; *Frazier v City of New York*, 47 AD3d 757 [2008]; *Portanova v Dynasty Meat Corp.*, 297 AD2d 792 [2002]). Accordingly, All Lock's motion for summary judgment dismissing plaintiff's complaint and all cross claims against it is granted.

28-90 Review's Cross Motion for Summary Judgement

28-90 Review cross-moves for summary judgment dismissing plaintiff's complaint insofar as asserted against them . As noted above, all of plaintiff's Labor Law claims have been withdrawn. With respect to plaintiff's remaining claim, 28-90 Review argues that the plaintiff cannot make out a prima facie case of negligence against it as there is no evidence that it created the alleged dangerous condition (snow-covered windshield) or that it had any prior notice of same. In support of its motion, 28-90 Review relies upon the deposition testimony of Maurer, its Assistant Secretary. Maurer testified that 28-90 Review only payed the taxes on the property to maintain the premises and that it never hired anybody to do any maintenance work at the premises. Rather, he stated that AA Trucking was in charge of hiring someone for clean up and snow removal on the premises. Maurer further testified that prior to the date of plaintiff's accident, he never received any complaints related to discarded glass windshields laying on the ground near the dumpsters or anywhere else on the premises.

28-90 Review also points to plaintiff's deposition testimony wherein he testified that two days before the accident, he did not see any glass on the ground near the dumpster. Based upon the foregoing, 28-90 Review argues that there is no evidence that it created the alleged dangerous condition, nor evidence as to when the subject glass windshield was placed on the ground near the dumpster, or for how long a period of time it had been there prior to the plaintiff's accident. Thus, 28-90 Review maintains that it cannot be held negligently liable for the injuries sustained by the plaintiff.

A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence (*see Arzola v Boston Props. Ltd. Partnership,* 63 AD3d 655 [2009]; *also see Bruk v Razag, Inc.*, 60 AD3d 715 [2009]). To provide 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 the defendant to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Thus, 28-90 Review, as the owner of premises, cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that it either created or had actual or constructive notice of the snow-covered glass windshield condition (*see Gordon v American Museum of Natural History,* 67 NY2d at 837; *Applegate v Long Is. Power Auth.,* 53 AD3d 515, 516 [2008]; *Powell v Pasqualino*, 40 AD3d 725 [2007]; *Singer v St. Francis Hosp.*, 21 AD3d 469 [2005]).

As the initial proponent of summary judgment, the court finds that 28-90 Review has met its burden by demonstrating that it did not create the alleged dangerous condition (snow covered windshield) and that it lacked actual or constructive notice of said condition (*see*

generally Cantwell v Fox Hill Community Assn., Inc., 87 AD3d 1106 [2011]; *Gloria v MGM Emerald Enterprises, Inc.*, 298 AD2d 355 [2002]). In opposition, the plaintiff has failed to raise an issue of fact establishing otherwise (*see Gerardi v Verizon N.Y., Inc.*, 66 AD3d 960, 961 [2009]; *Construction by Singletree, Inc. v Lowe,* 55 AD3d 861, 863 [2008]). There is clearly no evidence in the record that 28-90 Review created the subject condition. Furthermore, the plaintiff has failed to raise a triable issue of fact concerning whether 28-90 Review had actual notice of the snow-covered windshield condition, or that it existed for a period of time sufficient to give defendant constructive notice. In fact, the plaintiff himself admitted that he did not see any glass in the area of the dumpsters before the accident occurred and that he never complained to anyone about the appearance of any overflowing glass in dumpsters on the premises. Accordingly, 28-90 Review's cross motion for summary judgment dismissing the plaintiff's complaint and all cross claims asserted against it is granted.

In sum, All lock's motion for summary judgment dismissing the plaintiff's complaint and all cross claims against it is granted. 28-90 Review's cross motion seeking to dismiss plaintiff's complaint as well as all cross claims asserted against it is also granted.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

DEC 21 2012

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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