

Calabrese v Mayore Estates, LLC

2012 NY Slip Op 32846(U)

November 28, 2012

Sup Ct, New York County

Docket Number: 114995/10

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JOAN M. KENNEY
J.S.C.

PRESENT: _____
Justice

PART 8

Index Number : 114995/2010
CALABRESE, DIANE
vs.
MAYORE ESTATE LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 114995/10
MOTION DATE 9/21/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 17, were read on this motion to/for Sj Motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	_____	No(s). <u>1-11</u>
Answering Affidavits — Exhibits	_____	No(s). <u>12-15</u>
Replying Affidavits	_____	No(s). <u>16-17</u>

Upon the foregoing papers, it is ordered that this motion is

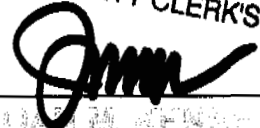
MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

FILED

DEC 03 2012

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

Dated: November 27, 2012

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
Diane Calabrese,

Plaintiff,

-against-

Mayore Estates, LLC, 80 Lafayette
Associates, LLC, Grubb and Ellis
New York, Inc., and Continental
Building Services, Inc.,

Defendants.

-----X
KENNEY, JOAN M., J.

DECISION AND ORDER
Index Number: 114995/10
Motion Seq. No.: 001

FILED

DEC 03 2012

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COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion
to dismiss.

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits	1-11
Opposition Affirmations and Exhibits	12-15
Reply Affirmation	16-17

In this personal injury action, defendants, Mayore Estates, LLC., 80 Lafayette Associates, LLC., and Grub and Ellis New York, Inc. (collectively, Mayore), move for an Order, pursuant to CPLR § 3212, dismissing the complaint. Movant also seeks summary judgment against defendant Continental Business Services (CBS) on its claims for common law indemnification.¹

Factual Background

On August 23, 2010, at approximately 7:30 a.m., plaintiff Diane Calabrese sustained personal injuries when she slipped in the lobby of 22 Cortlandt St. New York, NY (the accident). On the morning of the accident plaintiff walked (approximately 6-7 blocks) from the World Trade Center PATH station to her office. Plaintiff alleges that it was raining when she left her home in New Jersey that morning, and drizzling ("misty rain" according to plaintiff) when she walked from

¹Mayore Estates, LLC., 80 Lafayette Associates, LLC., and Grub Ellis New York, Inc. are the owners of the property; CBS is the cleaning/maintenance service company for the property.

World Trade Center station to her office. Plaintiff also alleges that the streets and sidewalks were wet from the rain.

Upon arriving to her office at 22 Cortlandt St., plaintiff walked in the building through the revolving doors and over the permanent floor mats in front of the doors leading up to the turnstiles. Plaintiff alleges there were no umbrella bags, or signs to warn of wet and/or slippery floor conditions. Plaintiff then proceeded past the security checkpoint where Mr. Guillermo Dominguez was working. After walking past the security desk, plaintiff says she slipped and fell on the marble floor leading to the elevators.

Plaintiff alleges that the water that she slipped on was not from water on her own shoes, but from water tracked in and left there by previous entrants of the building. Plaintiff asserts that not only was the water there prior to the accident, but that Mayore had actual notice from one of her co-workers, Ms. Jannys Ramos, that the floor was wet. In Ms. Ramos' affidavit dated August 28, 2012, Ms. Ramos states that she slipped on the same marble floor earlier that morning, and mentioned that fact to the "gentleman working behind the desk in the lobby." (Ramos Affidavit, Plaintiff's Exhibit 1). Mr. Dominguez disputes this assertion, and Mayore claims that plaintiff slipped on water that was tracked in on her own shoes.

Arguments

Mayore contends that this matter must be dismissed because: 1.) they did not breach any duty owed to plaintiff as mats were laid down by the entry area; 2.) they had no notice of the alleged dangerous condition; 3.) CBS was responsible for maintaining the floors and therefore must indemnify Mayore; and 4.) Mayore was not negligent.

Plaintiff argues that defendants had actual and constructive notice of the alleged dangerous condition and therefore are liable to plaintiff.

Defendant CBS argues that indemnification must be denied because Mayore cannot establish that CBS was responsible for the alleged dangerous condition that purportedly caused plaintiff's injuries.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion 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 University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when

defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition (*Aviles v. 2333 1st Corp.*, 66 A.D.3d 432, 887 N.Y.S.2d 18 [1st Dept. 2009]; *Baez-Sharp v. New York City Tr. Auth.*, 38 A.D.3d 229, 830 N.Y.S.2d 555 [1st Dept. 2007]). In *Baez*, the Court stated that defendant “failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the watery and hazardous condition.” 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 (see *Strowman v. Great Atl. & Pac. Tea Co., Inc.*, 252 A.D.2d 384, 675 N.Y.S.2d 82 [1998]). A personal injury plaintiff may satisfy burden of showing landowner's constructive notice of hazardous condition by evidence that an ongoing and recurring dangerous condition existed in the area of accident (see *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, 650 N.Y.S.2d 717 [1996]).

“Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer.” (*Trump Village Section 3, Inc. v New York State Housing Finance Agency*, 307 AD2d 891 [1st Dept. 2003]). “Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated in the wrongdoing cannot receive the benefit of this doctrine.” (*Id.*, citing *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449 [1st Dept. 1985]).

Here, a factual dispute exists warranting denial of the within motion. Specifically, the parties dispute whether or not defendants received notice of the purported condition that caused the accident. Plaintiff maintains that Mayore had actual notice of the alleged dangerous condition,

because Ms. Ramos alerted Mr. Dominguez, prior to the accident, that the floor was wet. Mayore argues that they received no such notice and that the cause of the accident was the water on plaintiff's own shoe, tracked inside due to the rain outside.

Additionally, Mayore asserts that since CBS would be responsible for any dangerous condition that may arise then Mayore should be indemnified by CBS should any judgment be levied against Mayore. CBS disputes this claim, alleging that while their contract with Mayore stated that CBS maintain the lobby, it did not state that this duty was exclusively CBS' responsibility. (Mayore Exhibit G, p. 40; *Cresvale International Inc. v Reuters America, Inc., et al.*, 257 AD2d 502 [1st Dept. 1999]). Moreover, the contract did not contain any specific indemnification clause. As such, CBS has rebutted Mayore's claims for indemnification.

Accordingly, it is hereby

ORDERED, that defendants' (Mayore) summary judgment motion, dismissing the complaint, is denied, in its entirety; and it is further

ORDERED, that defendants' (Mayore) summary judgment motion, seeking indemnity against defendants (CBS), is denied, in its entirety; and it is further

ORDERED, that the parties proceed to mediation forthwith.

Dated: November 28, 2012

ENTER:


Joan M. Kenney, J.S.C.

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