Guldner v Columbia Univ.

2013 NY Slip Op 30618(U)

March 28, 2013

Sup Ct, New York County

Docket Number: 111806/2009

Judge: Debra A. James

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SCANNED ON 4/1/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

JOHN J. GULDNER and CAROLE GULDNER,

Plaintiffs,

- v -

COLUMBIA UNIVERSITY,

Defendant.

Index No.: 111806/2009

Motion Date: 07/20/12

Motion Seq. No.: 02

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

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

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Cross-Motion: ☐ Yes ☒ No

Defendant moves motion for summary judgment pursuant to CPLR §3212 dismissing this action where plaintiff seeks damages for injuries suffered when he slip and fell. He alleges that defendant breached its duty, *inter alia*, to warn him that its employees were cleaning/stripping the floors where is fell at the time and place in question.

In his deposition, plaintiff testified that on October 24, 2008 he was working for defendant as a refrigeration/assistant watch engineer. During a double shift, he remained at work instead of traveling home. At approximately 11:30 pm, plaintiff used the restroom on the third floor where he observed people

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

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**

cleaning, and whom he "assumed were going to wax the floor."

Around 3:30 am plaintiff went to use the restroom for a second time. He traveled again to the third floor and claims that he did not see anybody around before he stepped out of the elevator when he walked into the corridor. Plaintiff did not recall hearing the buffer as the elevator doors opened but admitted that he "may have" heard one because he has heard buffers in operation before and has used one himself. After exiting the elevator, plaintiff went to turn the corner and his left leg slipped on what he described as "wet ice". He landed on his left hip and further described what was on his clothes as "a slimy transparent—it looked like water to me but it was slimy, almost like . . . an egg white." He did not remember seeing any cones as he exited the elevator, and recalled that the floor appeared "ordinary". Nor did he recall hearing anyone calling out to him warning him not to come out of the elevator. He testified hat no one came to his assistance but that he had to ask for aid as he lay on the floor.

Joseph Agymang, a custodial supervisor employed by defendant, testified as his examination before trial that on October 24, he assigned five workers to the third floor of the building, with the assigned project of cleaning/stripping/waxing the floor. The plan was to complete the project in one day, by approximately 6 am on October 25. He claims that wet floor signs

were to be put up to warn anyone about slipping. On his 2:30 am round to check on the workers, he stated that he came up to the third floor by elevator but was not able to exit because the workers told him not to do so. He noted the smell of the stripping soap and voices and a machine running, even from the upper floor. He testified that he received a call around 4:45 am alerting him that an incident had occurred in the building. He claims that when he arrived, he saw precaution tape. He testified that Jimmy Tedder, one of the five workers, explained to him that "Alan was yelling . . . do not step out, do not step out, do not step out, three times, but the man says, "whatever, I gotta go home."

Jorge Rendon, another employee of defendant, testified that he noticed plaintiff on the floor because he heard a loud scream. He explained that Tedder and Alan Williams, another employee, were yelling at plaintiff warning him not to come out of the elevator but they did not hear plaintiff say anything back. He testified that "We didn't use no caution tape," but recalled seeing more than one cone.

It is axiomatic that in order to prevail on a summary judgment motion, the proponent must establish a prima facie showing of entitlement to judgment as a matter of law, providing sufficient evidence to eliminate any material issues of fact from the case. *Santiago v. Filstein*, 35 AD3d 184, 186 (1st Dept 2006).

The party opposing the motion then has the burden to demonstrate that evidence exists which raises a factual issue requiring a trial. If any doubt exists as to whether a triable issue of fact exists, the motion for summary judgment should be denied. *Rotuba Extruders, Inc. v. Ceppos* 46 NY2d 223, 231 (1978).

Property owners have a duty to act reasonably in maintaining their property and to keep their property in a reasonably safe condition while considering such factors as the likelihood of injury to others, the seriousness of the injury and the burden of avoiding risks. *Basso v. Miller*, 40 NY2d 233, 241 (1976). A property owner breaches that duty if the property owner has actual or constructive notice of a dangerous condition that precipitated the injury. *Waiters v Northern Trust Co of NY*, 29 AD3d 325, 326 (1st Dept 2006). The court has held that "A prima facie case of the negligent application of wax may be established by evidence that a dangerous residue of wax was present". *Ullman v. Cohn*, 248 AD2d 200 (1st Dept 1998).

A property owner moving for summary judgment bears the burden of showing that it neither created nor had actual or constructive notice of the dangerous condition. *Ross v. Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 (1st Dept 2011). To constitute constructive notice, a dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident which would allow the defendant to

remedy it. *Uhlich v. Canada Dry Bottling Co. of New York,* 305 AD2d 107, 107 (1st Dept 2003). In order for defendant to meet its initial burden on the issue of lack of constructive notice, evidence must be offered as to when the area in question was last cleaned or inspected relative to the time plaintiff fell. *Oliveri v. Vassar Bros. Hosp.*, 95 AD3d 973, 975 (2d Dept 2012). However, once a showing is made that defendant caused the dangerous condition, plaintiff need not establish evidence of any further notice of such condition. *Panagakos v. Greek Archdiocese of North and South America,* 213 AD2d 336 (1st Dept 1995). The rationale for such holding is that a defendant who creates an "unreasonable risk" has notice of the dangerous condition. *Panagakos, ibid.* In concluding what is reasonable, courts can look to such factors as who plaintiff is and what his purpose is for being on such property. *Basso, supra,* 40 NY2d at 242.

Assuming there is an issue of fact as to whether the defendant maintained the premises in a reasonable condition, defendant would then have to establish that its conduct did not cause plaintiff's injury. *Acunia ex. Rel. Salgado v. New York City Dept. Of Education,* 68 AD3d 631, 631 (1st Dept. 2009). An event that is not foreseeable breaks the chain of causation. *Bracci v. Roberts,* 217 AD2d 897 (3d Dept 1995). There can be no liability where the presence of the injured party was not reasonably foreseeable. *Bracci, ibid.*

The owner may, in some instances, discharge its duty to properly maintain the premises by giving adequate warning of the dangerous condition. *Basso*, supra. However, even if a dangerous condition exists, a property owner has no duty to warn when such condition is readily observable. *Westbrook v. WR Activities-Cabrera Markets,* 5 AD3d 69, 71 (1st Dept 2005); *see Ullman, supra*. A dangerous condition is open and obvious when it "could not reasonably be overlooked by anyone in the area whose eyes were open, making a posted warning of the presence of the hazard superfluous." *Westbrook, supra*. Whether a danger is open and obvious is usually fact-specific and thus a question for the jury. *Tagle v. Jakob*, 97 NY2d 165, 169 (2001). However, while the "open and obvious nature of a hazard merely negates the duty to warn of the hazard, it does not eliminate the duty of the property owner to maintain premises in a reasonably safe condition." *Westbrook, ibid,* at 72.

In *Eisenberg v. Irving Kemp*, 256 AD 698, 701 (1st Dept 1939), the plaintiff slipped and fell in the lobby of a building occupied by defendant. At the time of the accident, the floor and lobby in front of the elevators was being oiled and waxed by defendant. Plaintiff alleged that she saw no one in the lobby and was not warned that the floor was being oiled or waxed. An employee testified that he directed plaintiff to an area of the floor that was not being waxed and when he turned around he found

that plaintiff had fallen on the floor. The court held that defendant was "under a duty to exercise reasonable care to keep the floor of the lobby in a reasonably safe condition for access and egress to persons lawfully on the premises and fee from fault. . . ." 256 AD at 702. The court stated that "it was also for the jury to say whether in the exercise of reasonable care the cleaning company should have posted or given some form of notice or warning to persons stepping from the elevator into the lobby while it was oily and wet", 256 AD at 703.

The holding in *McPherson v. Grant Advertising, Inc.*, 281 AD 579 (1st Dept 1953) is instructive, grounded on facts that are distinguishable from those in *Eisenberg*. In *McPherson*, plaintiff, who was working at night after usual business hours at defendant's office, observed that the co-defendant cleaning company was waxing the corridor, which led to the cloakroom where she left her hat, and was about five feet away from her office. When she finished working, she entered the cloak room, slipped, fell and was injured. The court determined that there was no evidence from which it could be inferred that the floor was being waxed in a negligent manner. As plaintiff had observed the floor being waxed, the court held that "she possessed whatever information a warning would have given." *McPherson*, at 583.

More recently in *Brown v. New York Marriot Marquis*, 95 AD3d 585 (1st Dept 2012), the court determined that where it is

clear that warning signs were in place and plaintiff observed these warning signs, then absent any evidence of negligence, defendant is entitled to summary judgment.

In this case there is no issue as to notice since plaintiff's allegations are that defendant caused the dangerous condition, and it is not disputed that defendant ordered its employees to scrub, strip and eventually wax the floors, an activity in which its employees were engaged. On this motion, defendant must establish, as a matter of law, either that the condition was open and obvious so it need not provide any warning, or that it provided an adequate warning, and that it did not breach its duty to reasonably maintain its premises, or that it was not reasonably foreseeable that plaintiff would use the third floor restroom, the latter of which would break the chain of causation.

Defendant contends it met its duty to reasonably maintain the premises because (1) it adequately warned the plaintiff that the floor was being waxed by placing caution signs and cones in the area where the employees were working, as well as by verbally telling plaintiff not to come out of the elevator, thereby alerting him to the dangerous condition. Defendant also argues that the condition of the floors were open and obvious and that plaintiff unreasonably overlooked the condition of the floor. In addition, defendant argues it was not foreseeable that

plaintiff would leave the floor where he was working to use the bathroom on the third floor.

There are issues of fact concerning all of the foregoing. For example, plaintiff does not recall seeing either tape or cones or any evidence that the defendant's employees were scrubbing the floors prior to his exiting the elevator, and denies hearing them tell him to stay in the elevator. He testified that he noticed a slimy substance on his clothing only after falling. This case is analogous to *Ullman v. Cohn*, 248 AD2d 200 where court held that a dangerous residue of wax (here stripping fluid) was present and therefore a prima facie case of negligence was demonstrated. As in *Ullman*, plaintiff here claims he was not aware and could not reasonably observe the dangerous condition before he slipped. The evidence at bar raises an issue of fact and is distinguishable from *McPherson*, where the court stated that plaintiff was sufficiently warned about a danger that was readily observable because she observed the floor being waxed. Here plaintiff testified that the floors looked "ordinary", but that he learned otherwise when he felt and saw the substance on his clothing upon his fall.

Although there is no duty to warn of an open and obvious condition, *Bruker, supra,* the issue whether the condition was open and obvious cannot be resolved as a matter of law, given the conflict in the in the evidence. These issues

implicate the credibility of plaintiff and defendant's employees, which are not appropriately resolved on a motion for summary judgment. *Santos v. Temco Serv. Indust., Inc.*, 295 AD2d 218, 218-219 (1st Dept 2002); *Tagle, supra.*

As to whether it was reasonably foreseeable that plaintiff would go to the third floor to use the restroom, the evidence cited by plaintiff-- that the building was open twenty-four hours, that defendant knew that employees would sleep over between shifts, and that plaintiff had previously used the 3rd floor restroom-- raises a question of fact. *See Braci, supra.*

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that the parties are directed to appear at . Mediation-1 on May 14, 2013, at 10:30 A.M., and if the action is not settled in Mediation-1, the action shall be remanded to IAS Part 59, 71 Thomas Street, for a pre-trial conference.

This is the decision and order of the court.

Dated: March 28, 2013 **ENTER:**

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DEBRA A. JAMES J.S.C.