

**Castillo v Seeken 79 Realty, LLC**

2013 NY Slip Op 31859(U)

August 2, 2013

Sup Ct, Queens County

Docket Number: 700372/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

GRISELDA CASTILLO, Index No.: 700372/2011  
Plaintiff, Motion Date: 05/03/13  
- against - Motion No.: 23  
Motion Seq.: 1  
SEEKEN 79 REALTY, LLC and ROTNER  
MANAGEMENT CORP.,

Defendants.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by defendants, SEEKEN 79 REALTY, LLC and ROTNER MANAGEMENT CORP., for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendants and dismissing the plaintiff's complaint:

Papers Numbered

Notice of Motion-Affidavits-Memo of Law.....1 - 8  
Affirmation in Opposition-Affidavits-Exhibits.....9 - 12  
Reply Memorandum.....13 - 15

This is an action for damages for personal injuries sustained by the plaintiff, Griselda Castillo, on September 10, 2010, when she purportedly slipped and fell on a wet elevator floor in the premises located at 175 West 79<sup>th</sup> Street, New York County, New York. Plaintiff alleges that as a result of the accident she sustained, inter alia, disc herniations of the lumbar spine.

The plaintiff commenced this action by filing a summons and complaint on July 11, 2011. In her bill of particulars the plaintiff alleges that the accident occurred as a result of a wet slippery floor in the elevator when she entered the elevator at the basement level. Plaintiff claims that the defendants were

negligent in permitting the water to accumulate in the elevator and in failing to mop up the water allowing the premises to remain in an unsafe and dangerous condition. In addition, plaintiff alleges that the defendants failed to give the plaintiff warning or notice of the unsafe condition despite having actual knowledge of the wet floor. Plaintiff claims that the defendants, the owner and property manager of the premises, had actual notice of the wet floor in that a building employee, elevator operator Jesus Jimenez, was aware that water was present on the elevator floor and failed to remedy the situation, failed to warn the plaintiff of the hazard and failed to erect protective barriers around the hazardous condition. Further, the plaintiff claims the defendants were negligent in allowing the wet condition to exist on the floor and failed to take measures to remedy or correct the dangerous condition. Plaintiff alleges that the defendants breached their duty to maintain the area in a safe condition. Plaintiff also claims that the defendants had constructive notice of the hazardous condition as the wet floor was visible, apparent and existed for a sufficient length of time prior to the accident that the defendants had sufficient time to notice and remedy the dangerous condition.

Issue was joined by service of the defendants' answer dated September 19, 2011. The defendants now move for an order, pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint. The defendants contend that they are not liable for the accident because the defendants' employee, Mr. Jimenez, expressly warned the plaintiff to wait before entering the elevator while he went to get a mop to clean up the water. Defendants contends that they are entitled to summary judgment dismissing the complaint because the defendants met their duty to warn of the dangerous condition and the plaintiff was culpable for disregarding the warning entirely and entering the elevator before Mr. Jimenez was able to mop up the wet floor.

In support of the motion, the defendants submit an affirmation from counsel, Anthony Marino, Esq., a copy of the pleadings; a copy of plaintiff's amended verified bill of particulars; and copies of the transcripts of the examinations before trial of the plaintiff, Ms. Castillo, and Jesus Jimenez, an employee of defendant, Seeken 79 Realty LLC.

The plaintiff, Griselda Castillo, age 45, testified at an examination before trial on April 20, 2012, that at the time of the accident, in September 2010, she was employed as a cleaning lady for one of the tenants at the subject building located on the 15<sup>th</sup> floor at 175 West 79<sup>th</sup> Street. She stated that on the day

in question she arrived at the tenant's apartment 9:00 am. As part of her duties she would do laundry in the laundry room located in the basement. In order to get to the basement she would ring a bell and the elevator operator would bring the elevator to the 15<sup>th</sup> floor. She first went down in the elevator with the laundry at 9:00 am. After putting it in the washer she went back up to clean the apartment. After an hour she went back down to put the laundry in the dryer and then she went back up again to clean. At 11:30 am she went back down in the elevator and folded the clothes in the laundry room. At 12:00 she rang the bell for Jesus Jimenez to bring the elevator to the basement. As she entered the elevator with a basket of folded clothes in her hands she slipped on the floor of the elevator which she testified was caused by water on the floor. She stated that on her previous trips up and down in the elevator that morning the floor was not wet. She testified that she did not know why the elevator floor was wet. She testified that although she and Mr. Jimenez communicated in Spanish, he never told her not to go into the elevator, never told her the floor was wet, and never told her he was going to get a mop. Rather, it was her testimony that he was actually standing in the elevator when she entered and when she fell. She stated that after she fell Jimenez helped her up. She noticed that there was water on the floor and asked Jimenez why he didn't clean it up and why there were no signs warning of the wet condition. He told her "they don't put signs there."

The elevator operator/porter, Jesus Jimenez, age 38, testified at an examination before trial on April 26, 2012 that he is employed by Seeken Realty. He works in a 17 floor residential building located at 175 West 79<sup>th</sup> Street off of Amsterdam Avenue. He states that he reports to the building superintendent, who he knows as Andrew. He stated that he also works as a porter taking out the garbage and mopping the floors. He stated that to his knowledge the building does not have any caution signs to be placed on floors that were wet from mopping. He states that he orally warns tenants when the floors are wet. He stated that he knew the plaintiff as a cleaning lady that worked in the building, one day every other week, for tenant Julian Chan who lived in Apt 15A. He testified that on the date of the accident September 10, 2010, he was working as the elevator operator from 8 am to 4 pm. He was stationed in the elevator and would run it to a specific floor when he heard the buzzer go off. It had rained the whole morning but there were no mats or floor coverings on the elevator floor. He stated that he would mop the floor of the elevator when it got wet. He stated that he believed that on the date of the accident the floor was wet due to the rain and people tracking water in with umbrellas

or wet shoes. He kept the mop in the lobby. He remembers making multiple trips with the plaintiff to the basement that morning to do laundry and bringing her back up when she buzzed hm from the basement. He said that on the last occasion he went down to the basement to pick her up and before she entered he got out of the elevator car to go get a mop. He testified that he told her in Spanish to wait because he wanted to run to the laundry room to get the mop to dry off the floor of the elevator. He stated that there were visible puddles of water in the elevator. He left the elevator door open and left to get the mop. He returned five seconds later with the mop. When he returned, the plaintiff was standing inside the elevator and told him that she had just slipped and was pointing to her back. He did not see her fall in the elevator. He asked her if she was okay and she said she was. He then took her back to the 15<sup>th</sup> floor. He reiterated that when he left to get the mop he told her to wait while he ran to get a mop.

Defendants contend that the plaintiff's complaint should be dismissed because the elevator operator noticed water on the floor and warned the plaintiff to wait before getting on the elevator because he was going to get a mop. As such, defendants contend that the plaintiff disregarded his express warning and entered the elevator. Defendants assert that defendants are not negligent as a matter of law because the operator's statement satisfied the defendants duty to warn of a potentially dangerous condition.

In addition, the defendants move for an order dismissing the action against defendant, ROTNER MANAGEMENT COMPANY. Counsel states that Rotner is the property manager and had nothing to do with the accident. He states that Jimenez testified he was employed by Seeken 79 Realty and not by the management company. Defendant contends that there is no proof that the management company had ownership, occupancy or control of the property. Counsel also contends that there is no proof that the property manager breached a contractual duty to keep the premises in good condition (citing Usman v Alexander's Rego Shopping Ctr., Inc., 11 AD3d 450 [2d Dept. 2004][as managing agent, the defendant could be subject to tort liability for breach of its contractual duty to keep the premises in good condition only if its contract with the owner was a "comprehensive and exclusive" agreement that entirely displaced the owner's duty to maintain the premises safely]).

In opposition to the motion for summary judgment the plaintiff submits the affirmation of counsel, Robert J. Menna, Esq., in which he states that it is clear from the testimony of

Mr. Jimenez that he had actual knowledge that water was present on the elevator floor and he was aware that the water needed to be mopped up. Therefore, counsel argues that defendant has failed to show that it did not have notice of the hazardous condition. Counsel argues that although Jimenez left the elevator to get a mop, he was negligent in that he took no precautions to minimize the danger in the area by placing rugs, mats, barriers or warning signs. Counsel states that although Mr. Jimenez testified that he warned the plaintiff not to enter the elevator until he retrieved the mop, there is a question of fact in this regard as the plaintiff testified that Mr. Jimenez never told her not to go into the elevator, never told her he was going to get a mop and in fact in plaintiff's version of the accident, Jimenez was standing in the elevator when she fell. In addition, the plaintiff contends that the evidence submitted by the defendant, including the deposition testimony of the plaintiff and Mr. Jimenez, presents conflicting versions of how the accident took place which raises credibility issues to be assessed by a jury.

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto, this court finds as follows:

The testimony of Mr. Jimenez, the elevator operator employed by the defendant is sufficient to demonstrate that the defendant had actual knowledge that the floor of the elevator had become wet, possibly due to persons tracking water in from outside. Jimenez was also aware that the plaintiff wanted to enter the elevator and he testified that told her to wait while he went to get a mop. Defendants contends that they are not negligent as a matter of law because the plaintiff entered the elevator at her own risk in disregard of Jimenez's warning. However, the testimony of the plaintiff, to the effect that Jimenez never told her to wait, never went for a mop, and was actually in the elevator when she fell, clearly raises a question of fact as to whether the defendant did in fact warn the plaintiff of a dangerous condition, what that warning consisted of, and whether the defendant took any or adequate precautions to prevent persons from entering the elevator while he went to get a mop. Looking at the testimony in the light most favorable to the non-moving party, this Court finds that the defendant failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint as the plaintiff's testimony that she was not warned of the wet elevator floor raises a question of fact as to whether the defendant breached its duty to warn and whether the statement of the defendants' employee was a sufficient warning of a dangerous condition (see Toner v National R.R. Passenger Corp., 71 AD3d 454 [1<sup>st</sup> Dept. 2010][property owners

are not liable for slip-and-fall injuries unless they created the hazard or had notice of it but failed to exercise reasonable care to remedy it]). Here there is an issue as to whether the defendant took reasonable precautions to warn the plaintiff or to remedy the wet condition in the elevator.

As defendant failed to establish its entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of the opposition papers submitted by the plaintiff (see Giraldo v Twins Ambulette Serv., Inc., 96 AD3d 903[2d Dept. 2012]; King v 230 Park Owners Corp., 95 AD3d 1079[2d Dept. 2012]; Hill v Fence Man, Inc., 78 AD3d 1002 [2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby

ORDERED, that the branch of the motion for an order dismissing the complaint against the property management company, ROTNER MANAGEMENT CORP., is granted without opposition, and it is further,

ORDERED, that the defendants' motion for summary judgment dismissing the plaintiff's complaint against defendant SEEKEN 79 REALTY LLC is denied.

This matter remains on the calendar of the Trial Scheduling Part for October 9, 2013.

Dated: August 2, 2013  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**