

Muniz v New York City Tr. Auth.
2014 NY Slip Op 33485(U)
January 22, 2014
Supreme Court, New York County
Docket Number: 114460/09
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

STELLA MUNIZ,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,

JAN 31 2014

Defendant **NEW YORK
COUNTY CLERK'S OFFICE**

INDEX NO. 114160/09
RECEIVED
MOTION DATE 12/2/13
JAN 27 2014
MOTION SEQ. NO. 001
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Notice of Motion; Affirmation in Support – Exhibits A-I

No(s). 1-2

Affirmation in Opposition

No(s). 3

Upon the foregoing papers, it is ordered that the motion of defendant New York City Transit Authority (NYCTA) is denied.

In this action, plaintiff alleges that, on July 29, 2008, at approximately 5:00 p.m., she slipped and fell on a wet platform, littered with refuse, garbage and debris, while walking towards the F train at the Herald Square subway station located at West 34th Street and Sixth Avenue. At her deposition, plaintiff testified,

“When I fell, I put my hand on the floor and it was – I got full of mud. It was Chinese – some type of Chinese food, a lot.

Q: Before you fell, did you observe that garbage on the staircase?

A: No.

* * *

Q: How did you fall, in what way?

A: I slipp[ed].

* * *

Q: Where was the garbage on which you slipped on the left foot?

A: A lot.

(Continued . . .)

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

Muniz v New York City Tr. Auth., Index No. 114460/09

Q: Where was it?

A: On the floor.

*** * ***

Q: When was the first time you observed the garbage?

A: When I fell."

(Feinstein Affirm. Ex G [Muniz EBT], at 16-19.)

Defendant moves for summary judgment on the grounds that defendant neither caused or created the alleged defective condition nor had prior notice of the alleged defective condition. In support of its motion, defendant submits the deposition testimony of Vernon A. Kelley, a NYCTA cleaner of the subject location. (Feinstein Affirm. Ex G [Kelley EBT].) Defendant also submits the cleaning schedule of the subject location for Summer 2008. (Feinstein Affirm. Ex H.) Kelley testified that, he worked at the subject location in July 2008 on weekdays from 4p.m. to midnight and that, when he arrived at the station, he would "walk the platform to see how bad it is see, if [he] need[s] to get into gear immediately," and then he would start cleaning. (Kelley EBT at 16-17.)

Defendant has failed to demonstrate its entitlement to judgment as a matter of law because it has not established lack of notice of the alleged defective condition. To meet its initial burden on the issue of lack of constructive notice, defendant "must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." (*Granillo v Toys "R" US, Inc.*, 72 AD3d 1024 [2d Dept 2010][citations omitted]; *Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [1st Dept 2008]). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell." (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; see also *Seleznov v New York City Tr. Auth.*, 2014 WL 211315, 2014 NY App Div LEXIS 292 [1st Dept, Jan. 21, 2014, No. 110778/08].) Furthermore, testimony as to general procedures is insufficient for summary judgment purposes. (*Torres v New York City Tr. Auth.*, 79 AD3d 553 [1st Dept 2010].)

(Continued . . .)

Muniz v New York City Tr. Auth., Index No. 114460/09

Here, although Kelley testified that, during July 2008, he worked on weekdays from 4p.m. to midnight at the subject location and the accident report shows Kelley worked on the date of the alleged incident (Feinstein Affirm. Ex I), Kelley was unable to state that he had a specific recollection of working on the date of the alleged incident. (Kelley EBT at 18.) Kelley only testified as to what his general cleaning routine was for July 2008, not what actually occurred on July 29, 2008 before plaintiff's alleged incident. Moreover, the cleaning schedule submitted was a general cleaning schedule for Summer 2008, not the actual date of the alleged incident. Therefore defendant's motion for summary judgment must be denied.

FILED
JAN 31 2014
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN

Dated: 1/22/14
New York, New York


_____, J.S.C.

- 1. Check one:.....
 - 2. Check if appropriate:..... MOTION IS:
 - 3. Check if appropriate:.....
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| <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| <input type="checkbox"/> GRANTED | <input checked="" type="checkbox"/> DENIED |
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| <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| <input type="checkbox"/> DO NOT POST | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | <input type="checkbox"/> REFERENCE |

**SUPREME COURT OF THE STATE OF NEW YORK
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(Continued . . .)

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RECEIVED BY COURT CLERK

Dated: 1/22/14
New York, New York

 J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
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