Vetrano v TJX Cos., Inc.
2017 NY Slip Op 32036(U)
September 28, 2017
Supreme Court, New York County
Docket Number: 155571/14
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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MAUREEN VETRANO and ALLEN ROFF,

Plaintiffs,

Index No.: 155571/14
DECISION/ORDER

-against-

THE TJX COMPANIES, INC. and THE TJX COMPANIES, INC. d/b/a TJ MAXX and USM, INC, and NIBRY CLEANING SERVICES, LLC,

Defendants.

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THE TJX COMPANIES, INC. and THE TJX COMPANIES, INC. d/b/a TJ MAXX,

Third-Party Plaintiffs,

-against-

USM, INC,

Third-Party Defendant.

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Gerald Lebovits, J.

In this personal injury/negligence action, defendant/third-party defendant USM, Inc. (USM) moves for summary judgment to dismiss the complaint and all of the cross-claims asserted against it (motion sequence number 002). For the following reasons, this motion is granted and, after searching the record, these actions are dismissed.

BACKGROUND

This action accrued on May 13, 2014, when plaintiff Maureen Vetrano was injured when she slipped and fell while shopping in a building (the building) located at 35 Fitzgerald Avenue, in the City of Yonkers, County of Westchester, State of New York. (*See* notice of motion, Andreou affirmation, ¶ 17.) Co-plaintiff Allen Roff is Vetrano's husband. Defendants the TJX Companies, Inc. and the TJX Companies, Inc. d/b/a TJ Maxx (the TJX defendants) are commercial lessors of a portion of the building in which they own and operate a TJ Maxx department store. (*Id.*, ¶ 20.) The TJX defendants contracted with USM to provide janitorial services at several of their locations, including their premises at the building. (*Id.*, ¶ 23.) In turn, USM subcontracted with codefendant Nibry Cleaning Services, LLC (Nibry) to provide those services at the building. (*Id.*, ¶¶ 21, 23.)

At her examination before trial (EBT) on November 14, 2016, Vetrano stated that her accident took place at approximately 12:00 p.m. on May 13, 2014, while she was on the check-out line at TJ Maxx. (*See* notice of motion, exhibit M at 33.) Vetrano noted that, at that time, she was wearing low-heeled, rubber-soled shoes, and walking toward the end of the check-out lane, where she would turn and proceed to a register. (*Id.* at 10-11.) Vetrano averred that, before she turned toward the register, her left foot slipped on the floor, whereupon she fell and was injured. (*Id.* at 12.) Vetrano specifically stated that the spot where she slipped was not wet, but was "slippery," "like ice," and "shiny and slick." (*Id.* at 12-14.) Vetrano stated that she did not notice any cleaning personnel or signs in the area where she fell. (*Id.* at 11.) Vetrano later noted that she had not noticed that the patch of floor where she slipped was shiny or slick until after she had slipped on it, when she touched it. (*Id.* at 42-43.) Vetrano specifically stated that the floor felt "slippery" when she touched it, and that it "could have been" waxy, but that she was "not 100% sure what it was, but it was definitely slick." (*Id.* at 44-45.)

The TJX defendants were deposed on November 16, 2016, via assistant store manager Papa Diop. (*See* notice of motion, exhibit O.) Diop stated that he viewed store security camera footage of Vetrano's accident, and also personally inspected the accident site on May 13, 2014. (*Id.* at 24-26, 34-36.) Diop confirmed that the floor was shiny, but stated that he did not find it to be unusually slippery. (*Id.*, at 34-36.) Diop stated that TJX had hired USM to clean the floors at the store and that USM performed this work with a mechanical floor buffer between approximately 7:00 a.m. and 9:00 a.m. every weekday, before the store opened. (*Id.* at 37-40.) Diop also stated that, in addition to the daily cleaning and buffing, USM, or one of its subcontractors, performed an overnight "scrub and strip" treatment on the store's entire floor every couple of months, and estimated that the most recent time they had done so was " a couple of days" before Vetrano's accident. (*Id.* at 41-45, 82, 86.) Diop stated that he had not seen any TJX records stating exactly when that job was done;he noted that he himself had not seen it done because it was performed after his work day finished. (*Id.* at 44-47, 85-87, 124.)

USM was deposed on November 18, 2016, via its account manager, Michael McCourt, who confirmed that TJX and USM had executed a "master agreement" for janitorial and cleaning services on September 10, 2010, and that the agreement was in effect at the time of Vetrano's accident (the USM contract). (*See* notice of motion, exhibits P, Q at 10.) McCourt also stated that USM employees did not perform those services at the building, but that they were instead performed by employees of Nibry, USM's subcontractor. (*Id.*, exhibit Q at 15.) McCourt further stated that the services that USM was contracted to perform, and that Nibry actually performed, included daily cleaning of the floors and restrooms, and twice yearly "strip and wax" treatments on the floors. (*Id.* at 19-20.) McCourt also stated that USM's records indicated that the last date on which the floors had received a "strip and wax" treatment before Vetrano's accident was April 2, 2014. (*Id.* at 25-26.) McCourt further stated that USM's records did not disclose that this service had been performed in May 2014, prior to Vetrano' accident. (*Id.* at 25, 30.) McCourt finally stated that USM employees only visited the building to carry out monthly unannounced quality control inspections of Nibry's work. (*Id.* at 34-35.)

Nibry was deposed on February 2, 2017, via its president, Rina Rivera, who confirmed that USM and Nibry had executed a "subcontractor agreement" for maintenance services on April 8, 2013, and that the agreement was in effect at the time of Vetrano's accident (the Nibry contract). (*See* notice of motion, exhibits R, S at 18-19.) Rivera also confirmed that Nibry employee Jaqwan Sutton had performed Nibry's daily floor cleaning services on the area of the floor where Vetrano was injured, and that its services generally consisted of daily cleaning and buffing of the floors with a mechanical buffer, and a four-time yearly scrubbing and waxing of the floors with a mechanical polisher. (*See* notice of motion, exhibit S at 15-17, 23-26, 52-53, 56-57.) Rivera initially stated that Nibry had performed a strip and wax treatment on the building's floors on April 13 and 14, 2014. (*Id.* at 31-32.) Later, after reviewing Nibry's work records, Rivera stated that Nibry had actually performed this work on April 14 and 15, 2014. (*Id.* at 35-36.) Rivera denied that the buffing process made the floor any more slippery than usual, and also denied ever having received any complaints about the performance of Nibry's work at the store. (*Id.* at 43, 63.)

Plaintiffs commenced this action on June 4, 2014, and later filed a second amended complaint on September 2, 2015, that sets forth causes of action for: (1) negligence (on behalf of Vetrano); and (2) loss of consortium (on behalf of Roff). (*See* notice of motion, exhibits A, G.) The TJX defendants filed a joint answer on September 30, 2015, that includes a cross-claim against USM and Nibry for apportionment (i.e., contribution and indemnification). (*Id.*, exhibit H.) USM filed an answer on January 27, 2016, that includes a cross-claim against the TJX defendants and Nibry for contribution and indemnification. (*Id.*, exhibit I.) Nibry filed an answer on April 13, 2016 that set forth cross-claims against the TJX defendants and USM for: (1) common-law indemnity; (2) common-law negligence; (3) breach of contract; (4) contractual indemnity; and (5) "insurance coverage." *Id.*, exhibit J. Now before the court is USM's motion for summary judgment to dismiss the main complaint, the third-party complaint and all of the cross-claims asserted against it in this action (motion sequence number 002).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. (*See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *accord Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *accord Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003].) Here, Vetrano asserts one cause of action for negligence. Under New York law, "the traditional common-law elements of negligence [are] duty, breach, damages, causation and foreseeability." (*Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 [1st Dept 2005].) In its motion, USM raises several arguments to attack Vetrano's negligence claim.

First, USM cites a quantity of appellate case law for the proposition that a "general

assertion that [a plaintiff] was injured due to a slippery condition on a floor" is insufficient to sustain a negligence claim, as a matter of law, because "binding case law . . . requires that the plaintiff identify the nature of the actual condition that allegedly caused the accident." (*See* defendant's mem of law at 2-6.) USM cites the recent decision of the Appellate Division, First Department, in *Villa v Property Resources Corp.* (137 AD3d 454 [1st Dept 2016]), in which the court reiterated that "'the fact that a floor is slippery by reason of its smoothness or polish, in the absence of proof of a negligent application of wax or polish, does not give rise to a cause of action or an inference of negligence,'" in finding that the plaintiff had failed to raise a triable issue of fact concerning the alleged negligence via her "testimony that she saw the porter using the buffing machine the day before she fell, and her conclusory claim that the wetness she felt on her pants and hands after she fell smelled like 'wax or ammonia.'" (*Id.* at 454, quoting *Katz v New York Hosp.*, 170 AD2d 345, 345 [1st Dept 1991].)

USM also cites the more recent First Department decision in *De Paris v Women's Natl. Republican Club, Inc.* (148 AD3d 401, 404 [1st Dept 2017]), which found "a triable issue of fact as to whether there was a slippery substance on the bathroom floor that caused plaintiff to fall notwithstanding defendant's assertion that it never used wax," because the plaintiff had testified that "she 'saw a big line, the dent of my shoe in the wax all the way that I fell,' suggesting that her shoe gouged out some of the waxy substance where she fell." The Court observed that "[t]his was more than just leaving a streak, which would happen regardless of the condition of the floor." (*Id.* [internal citation omitted].)

USM argues that the *Villa* holding applies to this case rather than the *De Paris* holding, because the evidence here is more similar to that in *Villa*. (*See* defendant's mem of law at 5-6.) Specifically, USM notes that Vetrano's sole testimony was that the patch of floor on which she fell was "slippery," "slick" and/or "shiny," but that she failed to identify any substance on the floor, or to claim that her shoe had left any mark on it. (*Id.*) USM concludes that this evidence is, at best, speculative and conclusory, and fails to satisfy Vetrano's burden of proof. (*Id.*)

Vetrano responds that she "is claiming that the area where she fell was improperly waxed, cleaned or buffed prior to her accident and that [USM and Nibry] caused and/or created the dangerous condition by improperly mopping, waxing or buffing the area." (*See* Culhane affirmation in opposition, ¶ 74.) Vetrano also argues that USM's reliance on *Villa* and the cases that it follows is improper, because those cases are all distinguishable on the facts. (*Id.*, ¶¶ 82-84.)

After thoroughly reviewing the evidence and all of the applicable case law, however, the court disagrees and finds in favor of USM. In *De Paris*, the First Department found that issues of fact existed mandating the denial of the defendant's summary-judgment motion primarily from the "conflict" between the defendant's testimony — that it had never waxed the area of the floor where the plaintiff fell — and the plaintiff's observation — that her shoe had left a gouge mark in a substance that sat on that portion of the floor. (148 AD3d at 404.) Here, however, there is no such conflict. First, TJX does not deny that the portion of the floor, where Vetrano fell, was cleaned and buffed daily, and stripped and waxed periodically. There is an apparent disparity

between Diop's testimony — that the floor had been stripped and waxed "a couple of days" before Vetrano's accident — and McCourt's and Rivera's testimony — that the job had been performed a full month before Vetrano's accident. (*See* notice of motion, exhibits O, Q, S.) But Diop also stated that he had not reviewed any TJX records regarding when the job was done, and that he was not present at the time, because stripping and waxing of the floor took place after hours, when he had gone home. (*Id.*, exhibit O at 44-47, 85-87, 124.) McCourt and Rivera, on the other hand, both testified that the stripping and waxing job that was most contemporaneous with Vetrano's accident had been performed in mid-April 2014, a month beforehand, and both produced business records from their respective companies that supported this allegation. (*Id.*, exhibits Q at 25-26, 30, S at 31-32, 35-36.) The court notes that the foregoing evidence clearly shows that Diop's recollection is unsubstantiated, whereas McCourt's and Rivera's recollections are substantiated. Thus, there are no evidentiary grounds for the apparent disparity in their respective EBT testimony about when the last stripping and waxing job on the building's floor was performed before Vetrano's accident. The court finds that this apparent disparity is not sufficient to raise a triable issue of fact.

Vetrano does not claim that she slipped on a waxy buildup, but rather testified only that the portion of the floor where she fell looked "shiny" and felt "slippery" to her touch. (*See* notice of motion, exhibit M at 12-14.) Also, Vetrano did not claim that the area was wet, and testified that she was "not 100% sure what it was" that she had touched. (*Id.* at 42-45.)

Finally, Vetrano did not claim that her shoe had left a gouge mark in any buildup on the floor, or that it had left any mark whatsoever. In *Villa*, the First Department granted summary judgment dismissing the plaintiff's negligence claim because the "defendants met their initial burden of demonstrating that no waxy residue was on the floor through their superintendent's testimony that the floor was never waxed, but was mopped daily by a porter, and polished periodically with a buffing machine and a liquid that dries instantly." (137 AD3d at 454.) Here, Diop's, McCourt's, and Rivera's EBT testimony made roughly the same allegation regarding the floor's daily cleaning and buffing, and further indicated that any stripping and waxing had been done some time before Vetrano's accident.

Further, Vetrano's own EBT testimony did not identify any wetness or waxy buildup on the spot where she fell. The allegation that "the area where she fell was improperly waxed, cleaned or buffed prior to her accident" was alleged by her attorney in his affirmation. (*See* Culhane affirmation in opposition, ¶ 74.) But "an attorney's affirmation . . . is of no probative value in opposition to a motion for summary judgment." (*Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218, 219 [1st Dept 2001].) Therefore, the court discounts it. Vetrano's own testimony describes a "shiny and slippery," but a non-wet and non-waxy floor. The court believes that this testimony aligns with that in *Villa*, i.e., testimony that discloses the existence of "'a floor [that] is slippery by reason of its smoothness or polish,'" but does not include "'proof of a negligent application of wax or polish.'" (137 AD3d at 454 [citation omitted].) Because that testimony was found insufficient to support a negligence claim therein, this court similarly finds that the instant testimony is insufficient to support a negligence claim. USM's motion is granted.

The court notes that USM has raised several other arguments in support of its summary judgment motion. (*See* defendant's mem of law at 6-13.) But as a result of the above finding, the court need not reach these arguments.

The court also notes that, although it did not submit a cross-motion, TJX submitted opposition papers, in which it adopted all of USM's dismissal arguments, and opposed only so much of USM's motion as sought dismissal of the third-party complaint. The court further notes that Nibry did not submit any papers in connection with the instant motion sequence. Under CPLR 3212 (b), a court presented with a motion for summary judgment is empowered to search the record and grant summary judgment to any party, including a nonmoving party, which is entitled to such relief. (*See e.g. Levin v 117 Ltd. Partnership*, 291 AD2d 304 [1st Dept 2002], citing *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106 [1984].) A court may grant summary judgment in favor of a nonmoving party "only with respect to a cause of action or issue that is the subject of the motions before the court." (*Dunham v Hilco Constr. Co., Inc.*, 89 NY2d 425, 429-430 [1996].) Here, the court has found that Vetrano's negligence claim fails as a matter of law. Therefore, it fails equally as against all of the defendants. The failure of Vetrano's claim also renders TJX's third-party claim against USM moot. Accordingly, the court's grant of summary judgment operates to dismiss both the underlying action and the third-party action in their entirety as against all defendants.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant/third-party defendant USM, Inc. to dismiss the complaint and all cross-claims and third-party claims against it is granted and said complaint, third-party complaint and cross-claims are all dismissed with costs and disbursements to said defendant/third-party defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that, upon a search of the record pursuant to CPLR 3212 (b), summary judgment is granted in favor of the defendants/third-party plaintiffs the TJX Companies, Inc. and the TJX Companies, Inc. d/b/a TJ Maxx and defendant Nibry Cleaning Services, LLC, to dismiss the complaint and all cross-claims asserted against them; and it is further

ORDERED that defendant/third-party defendant USM, Inc. serve a copy of this decision and order on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: September 28, 2017

J.S.C.