Acevedo v New York City Tr. Auth.
2017 NY Slip Op 32756(U)
December 27, 2017
Supreme Court, New York County
Docket Number: 154245-2012
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRANSIT PART: 21

ANGELA ACEVEDO,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY and THE CITY OF NEW YORK,

Defendant(s).

DECISION AND ORDER

Index # 154245-2012

Mot Seq. 1

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

Papers	Numbered	NYCEF #
Defendant's Motion/ Affirmations/Memo of Law	1	20-34
Plaintiff's Memo of Law in Opposition	2	38
Defendant's Affirmation in Reply/Memo of Law	3	16, 19

LISA A. SOKOLOFF, J.

In this personal injury action in which Plaintiff Angela Acevedo alleges a slip and fall on an exposed subway staircase, Defendants New York City Transit Authority (Transit) and City of New York (City) move for summary judgment and to dismiss the complaint.

Plaintiff alleges that, on December 22, 2011 at approximately 2:00 pm, she slipped while descending the stairs to the "6" uptown train at the subway station located at the southeast corner 116th Street and Lexington Avenue, New York, New York. She claims that she walked down three stairs, then slipped because it was raining and there was "a lot of water on the floor" (Def. Mot, Ex. F, P. 20 L. 6, P. 21 L. 10 [Acevedo EBT dated 5/22/12]; Ex. G, P. 14 L. 6-7 [Acevedo EBT dated 7/31/13]).

Defendants move for summary judgment on two grounds: first, that recovery is barred by the storm in progress doctrine and that the City was an out-of-possession lessor.

Plaintiff contends that the cause of the slip and fall was improper maintenance of the subway stairs. In support, Plaintiff's counsel submits the affidavit and report of Plaintiff's engineer, Stanley Fein, dated August 13, 2016, which found dirt debris embedded in the friction treads and concluded that the treads were worn smooth and the rain water merely aggravated a pre-existing slippery condition. Mr. Fein's report was derived from a report prepared by Plaintiff's previous expert engineer, Herbert Braunstein, who passed away. The Braunstein report, dated March 18, 2012, was based on an inspection of the subway stairs on March 17, 2012, three months after the accident.

The report includes a photograph taken of the third subway step, but the photograph is otherwise undated. A photograph submitted in support or in opposition to a motion for summary judgment must be authenticated and be accompanied by the requisite foundation which requires proof that it was taken close in time to the accident and fairly and accurately represents the condition as it existed on the date of the accident (*Moore v Leaseway Transp. Corp.*, 49 NY2d 720 [1980]; *Clancy v Port of New York*, 55 AD2d 587 [1st Dept 1976]; *cf. Molinari v 167 Housing Corp.*, 103 AD3d 507 [1st Dept 2013] [holding that where a defect in a concrete surface has indicia of coming into existence over a period of time, a jury could find that, "whenever taken," certain photographs are "a fair and accurate representation" of the condition at the time of an accident]). Here, the photograph is inadmissible as Plaintiff has failed to establish that it is a fair and accurate representation of the subway stair on the date of Plaintiff's accident.

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Id.*) Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192 [1st Dept 2013]). To sustain liability against a municipality, the duty breached must be more than that owed the public generally (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]).

Here, the Notice of Claim alleges that, as a result of Defendants' negligent "operation, maintenance and control" of the stairwell step, Plaintiff was "caused to slip… due to standing puddle rain water upon said step." It is well established that the purpose of the notice of claim is to give a municipal authority the opportunity to investigate (*Teresta v City of New York*, 304 NY 440, 443 [1952]; *Goodwin v New York City Housing Authority*, 42 AD3d 63 [1st Dept 2007]). Although a notice of claim need not state a precise legal theory of recovery" (*Miller v City of New York*, 89 AD3d 612 [1st Dept 2011]), the test of the notice's sufficiency is "whether it includes information sufficient to enable the city to

investigate the claim" (*O'Brien v City of Syracuse*, 54 NY2d 353, 358 (1981)). Nothing alleged in the instant notice of claim furnishes the predicate for any theory of liability other than the one relating to the collection of rain water. Merely providing notice of the occurrence is not adequate to constitute notice of a particular claim (*Brown v New York City Transit Authority*, 172 AD2d 178 [1st Dept 1991]).

A party may not add a new theory of liability that was not included in the notice of claim (*Semprini v Village of Southampton*, 48 AD3d 543 [2nd Dept 2008]). The theory of liability now advanced by Plaintiff, that dirt was embedded in the friction treads which were worn smooth, was not previously asserted in either her notice of claim or complaint and substantially altered the nature of her claim (General Municipal Law § 50–e; *Cruz v City of New York*, 135 AD3d 644 [1st Dept 2016) and is therefore precluded (*Mahase v Manhattan and Bronx Surface Transit Operating Authority*, 3 AD3d 410 [1st Dept 2004].

Nor may a plaintiff use a bill of particulars to assert a new theory of liability if the theory was not raised in the plaintiff's notice of claim (*Clare-Hollo v Finger Lakes Ambulance EMS, Inc.*, 99 AD3d 1199 [4th Dept 2012]). As Plaintiff's counsel points out in his opposition, the fact that the friction threads were embedded with dirt was first mentioned in the bill of particulars, filed in February 2013, well over a year after the accident. The assertion in Plaintiff's bill of particulars that "the non-skid treads were filled with dirt," was an impermissible expansion of Plaintiff's notice of claim and instead raised a new, distinct, and independent theory of liability and must therefore be stricken (*Lopez v New York City Housing Authority*, 16 AD3d 164 [1st Dept 2005] [tenant's assertions raised for first time in bill of particulars that NYCHA permitted defective, dangerous, and hazardous conditions, failed to provide a safe apartment, failed to keep tenant free from injury, and failed to comply with statutes and ordinances went beyond mere amplification

of notice of claim, which set forth theory of liability based on condition of apartment's smoke detector/alarm]). Under these circumstances, Plaintiff may not rely on this new theory of liability to defeat summary judgment.

Moreover, Plaintiff's General Municipal Law § 50–e hearing testimony makes plain that her theory of liability is that she fell because it was 'raining hard," "it was wet," "the stairs were wet," "there was a lot of water" (Def. Mot, Ex. F, P. 20 L. 6, P. 21 L. 10 [Acevedo EBT dated 5/221/12]) and that "nothing else" contributed to her fall (Def. Mot, Ex. G, P. 39 L. 17-25 [Acevedo EBT dated 7/31/13]).

Beyond the inadequacy of the notice of claim, to recover damages, Plaintiff must demonstrate that Transit created, or had actual or constructive notice of, the hazardous condition which precipitated the injury (*Perez v Bronx Park South Associates*, 285 AD2d 402 [1st Dept 2001). As the proponents of the summary judgment motion, Defendants must establish, *prima facie*, that they neither created, nor had actual or constructive notice of the condition (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]). Defendants' have sustained their burden by presenting evidence, including Plaintiff's testimony that it was raining hard at the time of the incident, that there was a storm in progress when Plaintiff slipped and fell.

Under the storm in progress doctrine, a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is ongoing until a reasonable time after the storm has ended (*Baumann v Dawn Liquors, Inc.*, 148 AD3d 535 [1st Dept 2017]) so as to allow the defendants a reasonable period of time to clear the area. The evidence here demonstrated that the accident occurred while the

storm was still ongoing, a time during which defendants had no duty to clear the area of water accumulation.

The law does not require defendant Transit to constantly maintain dry subway stairs or station floors during a storm (*Solazzo v New York City Transit Authority*, 21 AD3d 735 [1st Dept 2005]). In *Duncan v New York City Transit Authority*, 260 AD2d 213 [1st Dept 1999], the Court noted that since the storm was ongoing, the accumulation could have resulted from the wet clothing and umbrellas of passengers, adding that it would be unreasonable to expect the defendant to constantly clean the floors of all subway cars during an ongoing storm (*Gentles v New York City Tr. Auth.*, 275 AD2d 388 [2nd Dept 2000] [affirming Transit's summary judgment where plaintiff fell on an exposed staircase that was wet from rain]; *Hussein v New York City Tr. Auth.*, 266 AD2d 146 [1st Dept 1999] [where sleet was still falling at the time of plaintiff's accident, no duty to provide constant, ongoing remedy when slippery condition is said to be caused by moisture tracked indoors during a storm]).

Thus, under the storm-in-progress doctrine, Defendants did not owe a duty to plaintiff to clear the accumulated precipitation. The affidavit of Plaintiff in which she explains that after returning to the stairway, the treads were worn down and embedded with dirt, is unpersuasive and appears designed to create a feigned factual issue to avoid the consequences of her prior contradictory deposition testimony that she fell due to the accumulated water and is insufficient to defeat a properly supported motion for summary judgment (*Ruffin v Chase Manhattan Bank, N.A.*, [1st Dept 2009]; *Telfeyan v City of New York*, 40 AD3d 372 [1 st Dept 2007]; *Karwowski v New York City Transit Authority*, 44 AD3d 826 [2d Dept 2007]).

This action must also be dismissed against the City. In its moving papers, Defendants have submitted a 1953 lease agreement between the City and Transit "in which the City relinquished possession and control of all of its transit facilities to the Transit Authority" (Def Mot Ex. I; *McGuire v City of New York*, 211 AD2d 428 [1st Dept 1995]). The City, as an out-of-possession lessor of the subway system, which retained no right to supervise or control its operation, cannot be held liable in negligence for Plaintiff's injuries (*Id.* at 429; Genco *v City of New York*, 211 AD2d 615, 616 [2d Dept 1995]).

Accordingly, it is

ORDERED, that Defendants' motion for summary judgment is granted and Plaintiff's complaint is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: December 27, 2017
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.