Fialkow v Mount Sinai Hosp.
2018 NY Slip Op 30924(U)
May 9, 2018
Supreme Court, New York County
Docket Number: 162264/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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SYBIL FIALKOW,

Plaintiff,

-against-

Index No.
162264/2014

THE MOUNT SINAI HOSPITAL and
CROTHALL HEALTHCARE, INC.,

DECISION & ORDER

MOT SEQ 003, 004

Defendants.

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Nancy Bannon, J.:

Motion sequence Nos. 003 and 004 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

I. INTRODUCTION

In this action to recover damages for personal injuries, arising from a slip-and-fall accident, the defendant Crothall Healthcare, Inc. (Crothall), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it (MOT SEQ 003). The defendant The Mount Sinai Hospital (Mt Sinai) separately moves for summary judgment dismissing the complaint against it (MOT SEQ 004).

II. BACKGROUND

On September 16, 2014, at approximately 9:30 a.m., the plaintiff was walking in the main corridor of Mt Sinai Hospital at 1468 Madison Avenue in Manhattan, when she slipped and fell

and was injured. It had been raining outside that morning. The plaintiff had been dropped off at the entrance to the hospital, and walked into the building. As she entered, she spoke to the security guard, and was directed to the elevators in the main corridor, which required her to go down some steps and then turn right towards the elevators. Next to the steps, there was a ramp that led to the main corridor, which was located to the right of the stairs, with a wall between the ramp and the steps that continued for several feet. She walked down the stairs, continued straight ahead for several feet, and then made a right turn toward the elevators. She noticed the floor was wet when she turned right, but she had to walk in that direction to get to the elevator. As she approached the elevator, she slipped. In both her deposition testimony and in an affidavit, she stated that the floor looked wet with a clear substance that looked like water, and that she was wet and her hands were wet from making contact with the floor. As she described it, the floor appeared to be tile, and there were no caution signs in the area.

Plaintiff commenced this negligence action against Mt Sinai, the property owner, and against Crothall, which was under contract with Mt Sinai to provide housekeeping management services, which included some supervision of Mt Sinai's housekeeping employees.

Crothall moves for summary judgment, contending that it did not owe any duty to plaintiff. It argues that it did not launch a force or instrument of harm and did not supplant Mt. Sinai's exclusive control over the premises, and that any failure to perform its contractual duties did not impose upon it a duty to a third party such as the plaintiff. It also argues that it did not have actual or constructive notice of any allegedly dangerous condition. Mt Sinai urges that the complaint be dismissed against it, because, based on the deposition testimony of its witness, Jessica Munoz, the security guard who responded right after plaintiff fell, it did not have actual

or constructive notice of the alleged dangerous condition which caused plaintiff's accident. It contends that Munoz visually inspected the accident site shortly before the fall when responding to a panic alarm from someone else, which caused her to pass nearby the area. Munoz testified that the floor was not slippery.

Munoz also took a photo while plaintiff was on the floor waiting for the emergency medical technicians, which she stated showed that the floor was dry at the time of the accident. Mt Sinai maintains that plaintiff's testimony that there was water on the floor does not raise a triable issue. It also points to the testimony of Crothall's employee, Marissa Janneire, who described Mt Sinai's floor matting system in the lobby area of the building, which she asserted included a run-off mat which was present in the main corridor at the time of the accident and positioned in an area close to the ramp. Janneire asserted that this mat, which is not a permanent mat, was placed there because there is a wheelchair station immediately to the right of the bottom of the staircase, and, when it is raining, if the wheelchairs went outside, there would be water dripping from them, and the mat would catch such run-off.

III. DISCUSSION

(A) Motion of Defendant Crothall Healthcare, Inc.

Defendant Crothall established that it owed no duty to plaintiff, and that its contract with Mt Sinai did not create any duty of care to third parties such as the plaintiff.

Although Crothall had a contract with Mt Sinai to staff the hospital with operations managers and provide housekeeping management services at the hospital, that contractual obligation, alone, does not give rise to any tort liability in favor of a third party. See Espinal v

Melville Snow Contrs., 98 NY2d 136 (2002); Casiano v Start El., 138 AD3d 582 (1st Dept. 2016); Vazquez v Port Auth. of N.Y. & N.J., 100 AD3d 442 (1st Dept. 2000); see also Perkins v Crothall Healthcare, Inc., 148 AD3d 1189 (2nd Dept. 2017). Under Espinal, there are three exceptions to that rule: "(1) where the contracting party launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties ; and (3) where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely or securely." Aiello v Burns Intl. Sec. Servs. Corp., 110 AD3d 234, 246 (1st Dept 2013); see Espinal v Melville Snow Contrs., supra. None of the Espinal exceptions applies here. Crothall demonstrated that it did not launch a force or instrument of harm. In opposition to that showing, the plaintiff fails to raise an issue of fact that Crothall was the source of the puddle on which she slipped. Nor did the plaintiff adduce evidence that Crothall's managers received any reports of water requiring mopping that might have triggered its contractual duties to dispatch a Mt Sinai housekeeping employee to the area. Neither has the plaintiff submitted evidence that she detrimentally relied upon Crothall's performance of its duties under its contract with Mt Sinai, since she does not even show that she was aware of the existence of the contract. See Vazquez v Port Auth. of N.Y. & N.J., supra; Vushaj v Insignia Residential Group, Inc., 50 AD3d 393 (1st Dept. 2008). In addition, the plaintiff has not shown that Crothall entirely displaced Mt Sinai's duty to maintain the hospital premises safely. See Vazquez v Port Auth. of N.Y. & N.J., supra; Perkins v Crothall Healthcare, Inc., supra; Spencer v Crothall Healthcare, Inc., 38 AD3d 527 (2nd Dept. 2007).

Contrary to the plaintiff's contention, even if Mt. Sinai were held liable here, the doctrine of respondeat superior may not be invoked here to hold Crothall liable by virtue of being the

special employer of Mt. Sinai's housekeeping employees. Under the doctrine of respondeat superior, an employer may be held vicariously liable for a tort committed by his or her employee within the scope of employment. See Jones v Hiro Cocktail Lounge, 139 AD3d 608 (1st Dept. 2016)l Rivera v Fenix Car Serv. Corp., 81 AD3d 622 (2nd Dept. 2011). Although "[a] general employee of one employer may also be a special employee of another employer" (Spencer v Crothall Healthcare, Inc., supra, at 528; see Thompson v Grumman Aerospace Corp., 78 NY2d 553 [1991]), a special employment relationship will only be found where the original employer relinquishes control of the employee to another person, thereby making the employee a special employee of the other person, and making that person, rather than the original employer, liable for the special employee's acts. See Sanfilippo v City of New York, 239 AD2d 296 (1st Dept. 1997); Reinitz v Arc Elec. Constr. Co., 104 AD2d 247 (3rd Dept. 1984). "[G]eneral employment is presumed to continue and this presumption can be rebutted only upon 'clear demonstration of surrender of control by the general employer and assumption of control by the special employer.'" Spencer v Crothall Healthcare, Inc., supra, at 528, quoting Thompson v Grumman Aerospace Corp., supra, at 557; see Perkins v Crothall Healthcare, Inc., supra; Bautista v David Frankel Realty, Inc., 54 A.D.3d 549 (1st Dept. 2008). Thus, although Crothall exercised some supervisory functions with respect to Mt Sinai's housekeeping employees, Crothall established, prima facie, that Mt. Sinai did not relinquish control over them, as Mt. Sinai paid their wages, provided them with benefits, and had the final decisional authority to hire, discipline, or fire them. Hence, Crothall demonstrated that the members of the Mt. Sinai housekeeping staff remained only general employees of Mt. Sinai, and the plaintiff fails to raise triable issues of fact either as to whether Mt. Sinai surrendered control over those workers or that Crothall assumed

such control so as to make them Crothall's special employees.

For these reasons, summary judgment must be awarded to Crothall dismissing the complaint as against it. See Perkins v Crothall Healthcare, Inc., supra; Spencer v Crothall Healthcare, Inc., supra.

(B) Motion of The Mount Sinai Hospital

Mt. Sinai's motion for summary judgment, however, must be denied.

To prevail in this action against Mt. Sinai, the plaintiff must ultimately establish it owed her a duty to provide reasonably safe premises, and that it breached that duty by creating a dangerous condition, or permitting the condition to remain despite having actual or constructive notice of the condition for a period of time sufficient for them to remedy it. See Betances v 185-189 Audubon Realty, LLC, 139 AD3d 404 (1st Dept. 2016). Constructive notice of a dangerous condition may be established with proof that the condition was visible and apparent for a sufficient period of time so that the defendants had an opportunity to correct it. See Gordon v American Museum of Natural History, 67 NY2d 836 (1986); Early v Hilton Hotels Corp., 73 AD3d 559 (1st Dept. 2010). Generally, a defendant moving for summary judgment on the ground that it did not have constructive notice of a dangerous condition must show that it recently inspected the area in question, or repeatedly inspected the area for a sufficient period of time leading up to the accident. See Maynard-Keeler v New York City Housing Auth., ____AD3d____, 2018 NY Slip Op 03322 (1st Dept., May 8, 2018); Guzman v Broadway 922 Enters., LLC, 130 AD3d 431 (1st Dept. 2015); Mike v 91 Payson Owners Corp., 114 AD3d 420 (1st Dept. 2014). Thus, a defendant's submission of evidence showing only that it had established a fixed maintenance and inspection schedule is insufficient to demonstrate its prima

facie entitlement to judgment as a matter of law where that defendant submits no evidence of when area of accident was last inspected prior to accident. See Dylan P. v Webster Place Assoc., L.P., 132 AD3d 537 (1st Dept. 2015), affd 27 NY3d 1055 (2016); see also Vargas v Cadwalader Wickersham & Taft, LLP, 147 AD3d 551 (1st Dept 2017).

Morever, where the defendant has actual knowledge of a particular ongoing and recurring hazardous condition, it may be charged with constructive notice of each specific reoccurrence of that condition." See Chianese v Meier, 98 NY2d 250 (2002); Early v Hilton Hotels Corp., supra.

Here, Mt Sinai fails to show that its employee actually inspected the area near the accident prior thereto. Contrary to Mt Sinai's contention, Munoz actually testified at her deposition that:

> "According to my zone sheet and the different places it says that I responded, I *most likely* passed the area where the incident was, because I responded to an area to the left of – when you come down the ramp or stairs, the patient [plaintiff] was on the floor to the right, and I responded to the left at 8:46 for the panic alarm. So if there was something there to make a call for, I would have. I mean, I probably would have slipped if there was something there. If it was wet, I would have put a wet floor sign, and I would have called, you know, wrote down who I spoke to."

Mt Sinai fails to offer any additional details or proof as to when the area of plaintiff's fall was actually inspected for dangerous conditions. Munoz does not say that she inspected the area and saw a dry floor. At most, she indicated that she may have passed by the left side of the main corridor in which the plaintiff fell in order to respond to a panic alarm for another person, and describes what she "would have" done if she had passed by and observed a wet condition. This

testimony is insufficient to satisfy Mt. Sinai's burden on its motion. See Torres v New York City Tr. Auth., 79 AD3d 553 (1st Dept 2010); Baptiste v 1626 Meat Corp., 45 AD3d 259, 259 (1st Dept. 2007); Porco v Marshalls Dept. Stores, 30 AD3d 284 (1st Dept 2006).

In any event, the plaintiff raises a triable issue of fact as to whether Mt Sinai had constructive notice by virtue of its actual knowledge of an "ongoing and recurring dangerous condition" (Santana v 3410 Kingsbridge LLC, 110 AD3d 435, 435 [1st Dept. 2013] [internal quotation marks and citation omitted]; see Santiago v JP Morgan Chase & Co., 96 AD3d 642, 644 [1st Dept 2012]) existing in the area of the accident, which condition routinely was not fully addressed by Mt Sinai. Specifically, she adduced evidence that wheelchairs that come in from outside are parked at a wheelchair station right next to the base of the ramp area where she fell, and that when it rains, the wheelchairs routinely caused the puddling of water nearby. There is also a triable issue of fact as to whether Mt. Sinai took reasonable precautions against the forseeable risks arising from the puddling of rainwater dripping from the wheelchairs by, at a minimum, placing a sufficient number of mats near that area. See DiVetri v. ABM Janitorial Serv., Inc., 119 AD3d 486 (1st Dept. 2014); Santiago v JP Morgan Chase & Co., supra.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant Crothall Healthcare, Inc. for summary judgment dismissing the complaint as against it (MOT SEQ 003) is granted, and the complaint is dismissed against that defendant; and it is further,

ORDERED that the motion of defendant The Mt Sinai Hospital for summary judgment

dismissing the complaint against it (MOT SEQ 004) is denied.

This constitutes the Decision and Order of the court.

Dated: May 9, 2018

ENTER:

J.S.C.

HON. NANCY M. BANNON