SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JOEL DERBY and LINDA DERBY,

Plaintiffs,

–against–

809 FIRST AVENUE CONDOMINIUMS, LLC, and PERFECT BUILDING MAINTENANCE CORP.,

Defemdants.

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Index No. 152728/2015
Motion Seq. No. 001

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a slip-and-fall action, defendants 809 First Avenue Condominiums, LLC (809 First Avenue) and Perfect Building Maintenance Corp. (Perfect Building) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

Plaintiff Joel Derby (Derby) alleges that, at approximately 7:45 a.m. on August 13, 2014, he fell in the lobby of a building, located at 809 First Avenue in Manhattan, whose common areas are owned by 809 First Avenue. More specifically, Derby alleges that he entered the building to attend a work meeting and he slipped on the "freshly mopped" floor in the lobby (Complaint, ¶ 9) and sustained injuries.

Plaintiff described his accident with greater detail at his deposition:

"Q: Was it a revolving door?
A: I think so. Yes.
Q: Where within the property . . . did your accident occur?
A: When I walked into the foyer, I fell on the floor.
Q: Was the revolving door automatic or did you have to push it with your hand in order to walk through that foyer?
A: You push it.
Q: Is that what you did on the day of the accident?
A: It's the only way to get in.
Q: Do you recall which hand you pushed the door with?

A: I can't remember.

...

Q: Did the accident occur within the space of the revolving door or were you already inside the foyer when the accident occurred?

...

A: I came through the door. I stepped in, and the floor was wet, and I ended up falling on the floor. The whole lobby was wet, and the guy was there with the mop"

(Derby tr at 21-22).

By a Complaint filed on March 19, 2015, Derby brought claims sounding in negligence against 809 First Avenue and Perfect Building, which does maintenance work for 809 First Avenue. Additionally, plaintiff Linda Derby brought derivative claims for loss of her husband's society, services, and consortium.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212

[b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]). Typically, "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]). Moreover, "[t]o hold a party with a duty of care liable for a defective condition, it must have notice, actual or constructive, of the hazardous condition that caused the injury" (*Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 62 [1st Dept 2006]).

Perfect Building

Perfect Building argues that it had no duty to Derby because it is a third-party contractor and none of the *Espinal* exceptions apply to it. In *Espinal v Melville Snow Contractors, Inc.* (98

NY2d 136 [2002]), the Court of Appeals held that while "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*id.* at 138), there are:

> "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting parties duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(*id.* at 140 [internal citation and quotation marks omitted]).

Perfect Building submits its contract with 809 First Avenue, which provides for maintenance and janitorial work and several areas of the building. Perfect Building and 809 First Avenue argue that Perfect Building's responsibilities under the agreement do not entirely displace 809 First Avenue's duty to maintain a safe premises and plaintiff does not challenge this argument. Nor does Derby suggest that he detrimentally relied on Perfect Building's continued performance of the contract. Instead, plaintiffs argue that Perfect Building launched an instrument of harm through a Yonel Molliere (Molliere), who mopped the floor twice before plaintiff entered the building.

Plaintiffs offer no expert testimony suggesting that Molliere mopped the floor in a fashion that constituted a failure to exercise reasonable care. Instead, plaintiffs' attorney offers a speculative account that involves his take on the security camera footage, which is not submitted as an exhibit with the opposition. He contends that the footage reveals that Molliere failed to wring out the mop after his first "dry mop" of the floor. Thus, plaintiffs argue that Molliere second "dry mop" of the floor actually exacerbated the dangerous wet condition.

Plaintiffs additionally point to a portion of Molliere's deposition transcript, in which he testifies that he "sporadically" places a "caution wet floors" sign in the lobby when it rains:

"Q: Would you use [the sign] if it was raining outside to alert people that the floor may be wet?
A: Yes.
Q: You would place it in the lobby near the revolving door area?
A: Yes.
Q: Would you place that there every time that it rained or only sporadically or something else?
A: Sporadically"

(Molliere tr at 119-120).

Molliere testified that he did not place the "caution wet floors" sign out before Derby's accident, but he did do so afterwards (id. at 120-122). Although in his subsequent affidavit, Molliere said that the floor was dry, when asked at his deposition why he did not put the "caution wet floor" sign out before plaintiff's accident, he does not cite that as a reason:

Q: Is there any reason why you didn't put the sign out on the day of Joel Derby's fall before he fell?
...
A: No; there is not any reason.

(id. at 122).

In support of its argument that Molliere's failure to exercise reasonable care exacerbated the wet floor condition to such an extent that he launched an instrument of harm, plaintiffs cite to *Haracz v Cee Jay, Inc.* (74 AD3d 1145 [2d Dept 2010]). In *Haracz*, the plaintiff, a mechanic, slipped in an automobile repair shop and the Court found that there was an issue of fact precluding summary judgment as to whether the contractor that had been hired to fix a roof leak exacerbated the leaky condition. The court held that a "contractor who creates or exacerbates a harmful condition may generally be said to have launched it" for purposes of *Espinal*-exception analysis (*id.* at 1146).

Even if the plaintiffs' account of the video were accurate and submitted in an evidentiary form, there is no evidence before the court that Molliere second "dry mop" of the floor made it

any wetter or more dangerous than it would have been without his actions. Moreover, his failure to put out a "caution wet floor" sign does not rise to the level of launching an instrument of harm. This is not to say that Molierre's exercised reasonable care, as a matter of law, but simply that the court does not reach the question of breach, as Perferct Building has no duty to plaintiff, as none of the *Espinal* exceptions are applicable. Accordingly, the branch of defendants' motion seeking dismissal of the complaint as against Perfect Building must be granted, as it had no duty to plaintiff.

809 First Avenue

809 First Avenue argues that it had no duty to plaintiff because, under the storm in progress doctrine, it had no duty to remedy any dangerous condition until the rain that was falling during plaintiff's accident had subsided. Derby stated at his deposition that he could not recall what the weather was like on the morning of his accident (Derby tr at 19). Defendants, however, submit meteorological records suggesting that it was raining at the time of plaintiff's accident, as well as an affidavit from Mark Kramer (Kramer), a meteorologist who stated that, after reviewing the certified meteorological records from August 13, 2014, he found that ".52 inches of rain fell from 12:51 a.m. EDT through 7:51 EDT at Central Park" and that "[a]t 7:45 a.m. EDT on that date, it was still raining" (Kramer aff, ¶ 3).

Generally, "the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by [a] storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended" (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]). In *Pippo*, as in many storm in progress doctrine cases, the plaintiff fell outside during a snowstorm (*id.*).

Defendants argue that the storm in progress doctrine applies also to indoor conditions related to rain, citing *Amsel v New York Convention Ctr. Operating Corp.* (60 AD3d 534 [1st Dept 2009]). However, in *Ansel*, which involved an indoor slip and fall on a rainy day, the First Department never mentioned the storm in progress doctrine, or the ongoing storm doctrine as it is sometimes called. Instead, *Ansel* held that that the defendant

> "established prima facie its entitlement to summary judgment by demonstrating that it had rained earlier in the day and was raining at the time of plaintiff's accident and that defendant had taken reasonable precautions to prevent the tracked-in water from accumulating by placing mats on the lobby floor and mopping the floor throughout the day and had neither actual nor constructive notice of the particular wet condition that allegedly caused the accident"

(id. at 535).

In other words, the Appellate Division applied principles of negligence and did not absolve the defendant of a duty to the plaintiff pursuant to the storm in progress doctrine. Thus, defendants' storm in progress argument fails, as defendants have provided no reason why it should be transplanted to indoor conditions caused by rain. Instead, 809 First Avenue was required to take reasonable precautions to prevent tracked-in water from creating dangerous conditions. Whether Molliere's actions amount to reasonable precautions is a question of fact for the jury.

Defendants argue that the complaint should be dismissed as there is no evidence that a dangerous condition was present. This argument relies on a contorted reading of Derby's deposition transcript, by which defendants cherry-pick testimony that Derby did not see the wet floor before he fell and ignore Derby's testimony that he noticed the floor was wet after he fell (Derby tr at 25). Defendants also rely on an affidavit from Molliere, Perfect Building's porter, who states:

> "At approximately 7:20 a.m., I used a dry-mop to remove moisture from the floor that was tracked-in from the rain outside. When I was finished, I looked at the floor and saw that it was dry. I then vacuumed the lobby. At approximately 7:45 a.m., as it was still raining, I dry-mopped the floor at the entrance a second time. After I was done, I looked at the floor at the entrance of the lobby once again and saw that it was dry. There was no moisture on the floor. A few seconds later, I was on my way to the back room to replace the dry-mop when I heard someone fall in the lobby. I turned around and saw a man on the floor near the entrance to the lobby"

(Molliere aff, ¶¶ 2-3).

Here, the contradicting testimony of Derby and Molliere clearly raises a question of fact as to whether the floor was wet and if such wetness constituted a dangerous condition. 809 First Avenue tries to settle this question by submitting still photographs from security video footage of the accident, but the photos are of a low resolution-quality and inconclusive. Thus, 809 First Avenue is not entitled to summary judgment based on the argument that there was no defect or dangerous condition in this case. Moreover, Molliere's own testimony at his deposition, in which he stated that he did not know why he did not put out a "caution wet floor" sign further confirms the existence of a question of fact as to whether a dangerous condition existed.

As to the question of notice, 809 First Avenue argues that even if there were water on the floor, defendants argue that they did not have notice of any dangerous condition. In support, defendants cite to *Solazzo v New York City Tr. Auth.* (6 NY3d 734 [2005]). In *Solazzo*, the Court of Appeals applied the ongoing storm doctrine, as it had been snowing, sleeting and raining on the day of the accident. The Court also found that the defendant had no notice of the specific condition—icy stairs—that caused the plaintiff's accident and held that "[a] general awareness that the stairs and platforms become wet during inclement weather was insufficient to establish constructive notice of the specific condition causing plaintiff's injury" (*id.* at 735).

Solazzo, as it applies here, stands for the proposition that the rain on the day of Derby's accident, by itself, does not give 809 First Avenue constructive notice of a dangerous condition. "Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

Plaintiffs argue that there was a recurring condition in which water pooled up in the lobby when it rains. In support, plaintiffs cite to the deposition testimony of Molliere, Perfect Building's porter. Molliere testified that he saw two people slip, one in the lobby and one in the revolving door area, because of slippery conditions caused by rainwater (Molliere tr at 96-106). Molliere additionally testified that he had been called "periodically" to clean up moisture following incidents where people slipped in lobby; when asked to specify how many times he had received such calls prior to Derby's accident, Molliere stated, "like four or five" (*id.* at 113). (Molliere tr at 96-102).

In support of their contention that Molliere's testimony constitutes a recurring condition, plaintiffs cite to *Pidgeon v Metro-North Commuter R.R.* (248 AD2d 318 [1st Dept 1998]). In *Pidgeon*, which involved a worker who slipped on a stairwell at a regional railway station, the plaintiff provided factual and expert testimony about a defect in the roof over the subject stairwell, that allowed for a leak onto the stairs. The First Department held that the plaintiff established "that the leak in the roof caused the portion of the steps in question to be wet *whenever* it rained, thereby establishing a recurring condition of which defendant and/or its agents and employees should have been aware" (248 AD2d at 320-321). Accordingly, the Court held that that there was, at least, an issue of fact as to notice requiring denial of the defendant's motion for summary judgment.

"Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). When moving for summary judgment, it is a defendant's burden to show that it did not have constructive notice of the alleged dangerous condition (*see Jahn v SH Entertainment, LLC* (117 AD3d 473, 473-474 [1st Dept 2014]).

Here, defendants proffer Molliere's affidavit—in which he says that the floor was dry after he mopped it—as evidence that they lacked constructive notice of the dangerous condition. However, there is a question of fact as to whether the floor was dry, given Molliere's own testimony at his deposition—particularly the fact that he put out a "caution wet floor" sign out after the accident—as well as Derby's testimony as to the state of the floor when he fell. As to a recurring dangerous condition, plaintiffs fail to provide any expert testimony that 809 First Avenue's floor presented a kind of danger outside the one commonly associated with wet floors. Thus, they fail to raise a question as to whether a recurring defect was present. However, a wet floor in itself may constitute a dangerous condition (*see Jahn,* 117 AD3d at 473). Moreover, Molliere's "dry mopping" of the floor, twice, raises a question of fact as to whether a wet condition existed on the floor for long enough for defendants to discover it. As there are issues of fact as to whether there was dangerous wet condition on the floor and whether 809 First Avenue had constructive notice of it, the branch of defendants' motion seeking dismissal of all claims against 809 First Avenue must be denied.

CONCLUSION

Accordingly, it is

ORDERED defendants 809 First Avenue Condominiums, LLC.(809 First Avenue) and Perfect Building Maintenance Corp.'s (Perfect Building) motion for summary judgment dismissing the complaint is granted only to the extent that the complaint is dismissed as against Perfect Building; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and is further

ORDERED that the action is severed and shall continue against 809 First Avenue; and it further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: January 2, 2018

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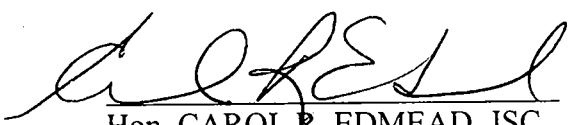

Hon. CAROL R. EDMEAD, JSC
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