SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

ALYSON SHATSKY,

Plaintiff,

Index No.: 162531/2015
Motion Sequence No.: 002, 003

- against -

DECISION/ORDER

HIGHPOINT ASSOCIATES V, LLC,
KEYSTONE MANAGEMENT, INC., and
BAGELS AND MORE,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In motion sequence number 002, defendant Maximillion Café, which plaintiff sues under its d/b/a Bagels & More (Bagels), moves under CPLR § 3212 for summary judgment dismissing all claims and counterclaims asserted against it. In motion sequence number 003, defendants Highpoint Associates V, LLC (Highpoint) and Keystone Management, Inc. (Keystone) seek summary judgment dismissing all claims and cross-claims asserted against them. Plaintiff cross-moves for partial summary judgment on the issue of liability. Although plaintiff submits her cross-motion in connection with motion sequence number 002, the cross-motion also addresses the arguments Highpoint and Keystone assert in motion sequence number 003. The moving parties' indemnification arguments are moot, as the same law firm now represents all three defendants. The Court consolidates the remaining portions of these motions for disposition and resolves them below.

This is a personal injury action. Bagel is a shop located at 1585 Third Avenue in New York. On June 11, 2015, when the accident occurred, Bagel had an air conditioning unit inside the shop,

directly above the front door. To divert the unit's water discharge so that it did not drip directly in front of Bagels and onto its customers, defendants rigged a tube from the unit which redirected the water onto the sidewalk to the side of the building. The complaint alleges that the water flowed onto the south-facing pedestrian ramp at the corner, and thus created a slippery and dangerous condition. Plaintiff alleges that she sustained injuries when, on June 11, 2015, she slipped and fell on the wet ramp.

In motion sequence number 002, Bagels asserts that it has no liability because it did not own, install, operate, maintain, repair, or control the detectable warning tile imbedded into the ramp. Bagels additionally argues that it had no duties with respect to the warning tile or the pedestrian ramp. Bagels acknowledges that property owners are obliged to maintain and repair the sidewalks in front of their property (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]), but contends that property owners are not responsible for maintaining pedestrian ramps (citing *Vidakovic v City of New York*, 84 AD3d 1357, 1358 [2nd Dept 2011]; see *Delgado v 5008 Broadway Assoc., LLC*, 149 AD3d 583, 583 [1st Dept 2017]).

Bagels also argues that the water that dripped onto the ramp was no more dangerous than rainwater and therefore Bagels did not create a dangerous condition. It points out that, under applicable precedent, "[t]he mere fact that a sidewalk . . . becomes more slippery when wet does not constitute an actionable defect" (*Bock v Loumarita Realty Corp.*, 118 AD3d 540, 541 [1st Dept 2014]). Bagels notes that in *Bernal v 521 Park Ave. Condo*, 128 AD3d 750 [2nd Dept 2015]), the Second Department found that dismissal was proper even though the plaintiff slipped on a metal grate which, she alleged, "was wet due to water that had run off from the cleaning of the building's façade." According to the court, the fact that the grate was wet was insufficient to show that a dangerous condition existed. Bagels also cites *Hurley v Related Management Co.* (74 AD3d 648

[1st Dept 2010]), in which the First Department placed the responsibility for maintaining a sidewalk grate controlled by Consolidated Edison on Consolidated Edison.

Finally, Bagels argues that everything under its control was in good condition. It asserts that it regularly maintained the portion of the sidewalk for which it was responsible, and it points to its employee's deposition testimony in support. It additionally submits the expert affidavit of engineer John Giardiello, who examined the pedestrian ramp in question. Mr. Giardiello concluded that the ramp and tile had a slip resistance factor of 1.18 dry and 1.05 wet – which, he points out, exceed the Occupational Safety and Health Administration (OSHA) requirements – and that it was firm, stable, and not defective. Thus, he states, to a reasonable degree of engineering certainty, that if the warning plate was in place when plaintiff fell on the ramp, the ramp was compliant with all applicable standards. The expert opined that the wetness caused by condensation from the air conditioner in question "would not have been a factor in causing the plaintiff's accident" (Giardiello Aff, ¶ 8 [NYSCEF Doc No 53]). Furthermore, he stated, both the sidewalk and the ramp were dry and free of any condensation from the dripping air conditioning unit when he inspected the area.

A large portion of Highpoint and Keystone's (movants) motion is devoted to the question of indemnification. Although this issue has been resolved, several of movants' allegations and evidence are pertinent to their and Bagel's potential liability. First, the motion discusses plaintiff's deposition testimony. Plaintiff stated that the surface of the ramp was wet, "a stream of wetness, a stream of discolored area, and it was shiny, so it was wet" (Shatsky Dep., p 28, ll 16-18). She stated that she believed the liquid had come from the air conditioner above Bagels "[b]ecause my friend who I had called . . . to accompany me to the ambulance later that day, went back to the corner, and saw a streaming run of water coming from the air conditioner down to the ground,

sloping toward and on the plate" (*id.*, p 30, ll 12-18). Her friend took a photo of the ramp and sent it to her. Plaintiff indicated that she had noticed the wetness some time that day, as she had sent a text message to one of her friends. She indicated that she did not remember when she realized the ramp was wet, did not know how much water was on the ramp, and did not remember noticing a wet condition before the date of the accident.

Movants also point to the deposition testimony of a Keystone employee, Guy Maddison. Maddison asserted that he had noticed water traveling down the sidewalk on two occasions prior to the accident, and that two weeks earlier he shouted in the direction of Bagel that someone had to clean up the water. Maddison stated that he did not direct his comment to any specific employee and he did not know whether anyone heard him. He followed up by email to three individuals at Keystone, but he did not receive a reply and did not follow up on his email. Maddison further stated that the water came from the tube through which the air conditioning water had been diverted. He did not know whether the water also ran to the ramp area. They further refer to testimony and affidavits which indicate that Bagel is the entity which installed the tube which allegedly diverted the water onto the sidewalk.

In addition, movants argue that the building and its lessees are not responsible for the maintenance of a corner pedestrian ramp (citing, inter alia, *Vucetovic.*, 10 NY3d at 520-21; *Gary v 101 Owners Corp.*, 89 AD3d 627, 627 [1st Dept 2011]; *Ortiz v City of New York*, 67 AD3d 21, 22-23 [1st Dept 2009], *reversed on other grounds*, 14 NY3d 779 [2010]). They state that, regardless, plaintiff does not assert that there was a defect or problem with the ramp itself, simply that it was wet. Further, movants argue that they are not liable because there is no evidence that they had notice of or created the alleged defect (citing, inter alia, *Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]; *Zuk v Great Atlantic & Pacific Tea Co.*, 21 AD3d 275, 275-76 [1st

Dept 2005]). They state that here, as in *Moser v Lavipour & Co., Inc.*, 35 AD3d 414, 415-16 [2nd Dept 2006]), there is no liability because, in fact, the ramp is not defective. Movants point to the conclusions in the Giardiello affidavit for support.

In opposition and in support of his cross-motion, plaintiff notes that summary judgment is not appropriate unless there are no triable issues of fact, and he states that defendants have not carried their burden. Plaintiff states defendants fail to satisfy their burden regarding whether a dangerous condition existed (citing *Touloupis v Sears*, 155 AD3d 807, 808-09 [2nd Dept 2017]). She argues that defendants unquestionably had actual and constructive notice of the water condition and thus liability is clear (citing *Hickson v Walgreen Co.*, 150 AD3d 1087, 1087-88 [2nd Dept 2017]). In support, she points to Guy Maddison's deposition testimony. She also cites to the testimony of Ratnawati Lubis, the president of Bagels, that Bagels installed the tube precisely because there was a water discharge problem.

Plaintiff additionally argues that even if there had not been notice, defendants would still be liable because they created the hazardous condition. She cites *Kesselman v Lever House Rest.* (29 AD3d 302, 304-5 [1st Dept 2006]), in which the First Department denied summary judgment because an issue of fact existed as to whether the employees of defendant created the wet condition which allegedly caused plaintiff's fall. Plaintiff notes that in *Irizarry v 1915 Realty LLC* (135 AD3d 411 [1st Dept 2016]), the First Department also denied summary judgment for this reason. Here, plaintiff states, there is no question that defendants created the condition and therefore she should be granted summary judgment on the issue of liability. "[A]t the very most for Defendants," she states, "there is an issue of fact mandating the denial of their motions" (Plaintiff's Mem of Law in Opp to Defendant's Motion for Summary Judgment [Plaintiff's Mem], at p 11). Plaintiff cites the New York City Plumbing Code § 301.3, which states that "plumbing fixtures, drains,

appurtenances and appliance used to . . . discharge liquid wastes or sewage shall be directly connected to the sanitary drainage system of the building." The violation of these and other duties, plaintiff contends, is evidence of negligence precluding judgment on defendants' behalf.

Plaintiff challenges the sufficiency of the affidavit of defendants' expert and counters with the affidavit of William Marletta, a certified safety professional who holds both a master's degree and a Ph.D. in occupational safety and health. Dr. Marletta also has written on the issue of slip resistance and safe design of ramps, including curb ramps. Dr. Marletta examined the accident site on November 7, 2017, over two years after the June 11, 2015 accident. He asserts that "the water flowing across the detectable warning surface created an unsafe and slippery condition, which should have been avoided or at least abated" (Marletta Aff, at ¶ 14). He suggests that the condition was dangerous because it made the ramp slippery on dry days when people "would not reasonably expect it to be wet or slippery" (*id.*, at ¶ 16), and so would not adjust their stride and balance accordingly. He opines that defendants were negligent for allowing the water to drain onto the sidewalk and spill onto the ramp. He cites several regulations and guidelines regarding safety which he states impose duties on defendants as well as on the City.

In opposition, among other things, Bagels argues that the Marletta affidavit is conclusory. In addition, Bagels asserts that the problems the affidavit highlights have to do with the maintenance of the ramp, which is not the responsibility of defendants. Bagels states that the affidavit incorrectly assumes that the ramp was wet when plaintiff fell, despite the lack of evidence supporting this allegation. Bagels notes that at the end of her deposition, plaintiff confirmed that she cannot remember whether, in the immediate aftermath of her accident, she had noticed whether the ramp was wet – or whether, as Bagels suggests, plaintiff only reached this conclusion after she saw the photo her friend texted to her. Bagels additionally challenges the applicability of the

building code provisions and other rules on which plaintiff relies. It alleges that plaintiff has not shown it had notice of any wetness on the ramp tile, as the Maddison testimony established only that the sidewalk was wet.

Discussion

Initially, the Court notes that it rejects Bagels' argument that plaintiff's cross-motion should not be considered because it is untimely. Under CPLR § 3212 (a), the Court has the discretion to consider plaintiff's motion "on good cause shown." Here, where plaintiff promptly responded to the motions to dismiss with her cross-motion, it is in the interest of justice and judicial economy to consider all three applications together. Further, under CPLR § 3212 (b), the Court has the power to grant judgment to any party if it "appear[s] that any party other than the moving party is entitled to judgment." Thus, even in the absence of good cause, consideration is appropriate. Moreover, the cross-motion is timely insofar as it opposes motion sequence numbers 002 and 003 and these arguments, which also relate to the cross-motion, must be considered.

Next, the Court turns to the substance of the motions. To prevail on a motion for summary judgment, the moving party must establish its claim or defense and show, prima facie, that there is no issue of material fact (*Jacobsen v New York City Health & Hosp. Corp.*, 22 NY3d 824, 833 [2014]). If the moving party makes this showing, the burden shifts to the non-movant to show that material issues of fact exist (*id.*). The movant's "burden is a heavy one" (*id.* [quoting *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (Jenack)]). If no party satisfies this burden, the court does not grant summary judgment (*Jenack*, 22 NY3d at 475).

After considering all the parties' arguments, even those not discussed in this order, the Court denies all three motions. None of the litigants have satisfied their heavy burden of showing

that judgment in their favor is appropriate. Instead, they have shown that issues of fact exist. For one thing, the experts present conflicting opinions, and it is not the motion court's role to determine their credibility. Instead, the affidavits create triable issues of fact (*Melendez v Dorville*, 93 AD3d 528, 528 [1st Dept 2012]). Defendants are correct that the City is responsible for maintaining the ramp (*Vucetovic.*, 10 NY3d at 520-21), but plaintiff does not contest this point. Instead, she asserts that, given the condition of the ramp, the water from the air conditioner would have created a hazard.

Plaintiff is not correct that the evidence shows, beyond a doubt, that defendants created a dangerous condition or had notice of it. Plaintiff is unclear as to whether she noticed a wet condition on the ramp when she fell or whether she presumed the ramp had been wet at the time because of the photo her friend took of the ramp later that day. Thus, there are issues as to whether the ramp was wet when she fell. Moreover, the conflicting expert statements raise issues as to whether the water would have created a hazard. Contrary to plaintiff's contention, the testimony of Guy Maddison also is not dispositive as to notice. The water condition to which his testimony refers was on the sidewalk. He specifically stated at his deposition that he never noticed whether the water continued down the sidewalk toward the ramp. On the other hand, plaintiff correctly points out that defendants were aware that the air conditioner dripped water, as this was the reason they diverted the water from the front entrance to Bagels; and both she and movants in motion sequence number 003 show that there was some notice that the water from the air conditioner created a noticeable amount of water on the sidewalk. This raises an issue as to whether this was sufficient to create a duty to determine whether this in turn caused a problem with the ramp.

In light of these and other triable issues, this matter should be tried by the factfinder, who can determine the credibility of witnesses and of the experts, and who also can decide whether,

under the circumstances at hand, defendants are liable for plaintiff's injuries. The Court further notes that it has considered movants' affirmation in response to Bagels' motion as well as plaintiff's reply papers in further support of her cross-motion, although it does not refer to them directly; and it has considered all the parties' arguments. Based on the above, therefore, it is

ORDERED that motion sequence number 002 and the cross-motion to that motion are denied; and it is further

ORDERED that motion sequence number 003 is denied.

Dated: August 15, 2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.