Nutt v Young Men's Christian Assoc. of Middletown, N.Y.
2018 NY Slip Op 34181(U)
December 5, 2018
Supreme Court, Orange County
Docket Number: Index No. EF006928-2016
Judge: Sandra B. Sciortino
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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KAY NUTT,

Plaintiffs,

-against-

YOUNG MEN'S CHRISTIAN ASSOCIATION OF MIDDLETOWN, NEW YORK and YMCA OF MIDDLETOWN, INC.,

Defendants.

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DECISION AND ORDER
INDEX NO.: EF006928-2016
Motion Date: 09/26/2018
Sequence No. 1

SCIORTINO, J.

The following papers numbered 1 to 19 were read on this motion by defendants for an order granting summary judgment dismissing the complaint:

PAPERS	NUMBERED
Notice of Motion / Affirmation (Campbell) / Exhibits A - F	1 - 8
Affirmation in Opposition (Del Duco) / Exhibits 1 - 9	9 - 18
Reply Affirmation (Campbell)	19

Upon the foregoing papers, the motion is denied.

This matter arises out of a slip and fall accident which occurred on November 10, 2014, in a hallway inside defendants' YMCA facility in Middletown, New York. Plaintiff had participated in a water aerobics class at the facility's pool and was returning to the women's locker room. After leaving the pool area, plaintiff took an elevator up one floor and walked down the hallway toward the locker room. Plaintiff alleges that, as she attempted to negotiate a set of three steps near the entrance to the locker room, she was caused to slip and fall by an accumulation of water at the top of the steps.

Plaintiff commenced the action by filing a Summons and Verified Complaint on October 12, 2016. Defendants served and filed an Answer dated December 1, 2016. Note of Issue was filed on March 20, 2018. At a conference before the Court on May 4, 2018, defendants' time to move for summary judgment was extended to June 29, 2018. The instant motion was timely filed on that date.

Motion for Summary Judgment

By Notice of Motion originally returnable on August 15, 2018 and adjourned to September 26, 2018, defendants seek summary judgment asserting that there are no triable issues of fact. Defendants assert that the water accumulation at issue was incidental to the use of the pool and/or the women's locker room. Defendants further contend that the complaint should be dismissed on the ground that defendants did not create the subject condition and had neither actual nor constructive notice thereof.

In opposition, plaintiff asserts that defendants have failed to satisfy their initial burden on the motion. In the alternative, plaintiff asserts that genuine issues of material fact preclude summary judgment. Plaintiff contends that, because the water which caused her fall was not in an area immediately surrounding the pool but in a hallway on another floor, the water accumulation cannot be said to be incidental to the use of the pool or the locker room. Further, plaintiff contends that defendants failed to make a *prima facie* showing of lack of constructive notice, as they did not submit any evidence as to when the area in question was last inspected. Finally, plaintiff argues that defendants had actual notice of a recurring hazardous condition, and, thus, as a matter of law, are chargeable with constructive notice of each reoccurrence of the condition. Plaintiff concludes that the motion should be denied.

In reply, defendants argue that plaintiff's claim of constructive notice necessarily fails as

plaintiff testified at her deposition that she did not notice any water on the subject stairs as she exited the locker room and walked to the pool approximately 90 minutes before her accident. Defendants further contend that the evidence establishes at most that defendants had a general awareness that a dangerous condition may be present. Such evidence is insufficient to support a finding that defendants had notice of a recurring condition.

The Court has fully considered the submissions of the parties.

Discussion

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact" (*Nash v. Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011]), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The function of the court on such a motion is issue finding, and not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), and the Court is obliged to draw all reasonable inferences in favor of the non-moving party (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000]).

In the matter at bar, defendants made a *prima facie* showing that they did not have actual notice of the condition alleged to have caused plaintiff's fall by submission of, *inter alia*, the deposition transcripts of plaintiff and three of defendants' employees. None of the transcripts contain any evidence that any employee saw or was notified of the alleged accumulation of water in the hallway outside the locker room on the date of the accident. In opposition, plaintiff failed to raise a triable issue of fact as to actual notice.

However, on the issue of constructive notice, defendants failed to meet their *prima facie* burden. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Rodriguez v. Shop Rite Supermarkets, inc.*, 119 AD3d 923 [2d Dept 2014], *quoting Birnbaum v. New York Racing Assn., Inc.*, 57 DAD3d 598 [2d Dept 2008]). Defendants on the instant motion submitted no evidence as to when the area where plaintiff fell was last inspected or cleaned.

Defendants' reliance on *Schiano v. TGI Friday's, Inc.*, 205 AD2d 407 (1st Dept 1994), for the proposition that plaintiff's failure to notice water on the subject steps 90 minutes prior to her accident bars a finding of constructive notice is misplaced. In that case, the Court noted that there was no allegation of an accumulation of water and no evidence that rain had fallen that evening. Rather, the alleged cause of plaintiff's fall was an accumulation of dew on a walkway on a humid summer night. The *Schiano* Court thus determined that this natural phenomenon did not constitute a hazard giving rise to any duty on the part of the defendant. In the matter at bar, it is alleged that defendants negligently permitted an accumulation of water to persist in a hallway on their premises. The cited case is clearly not analogous.

In any event, plaintiff in opposition raised triable issues of fact as to constructive notice. Specifically, plaintiff submitted the deposition transcript of Valerie Lalima, defendants' employee. The transcript was not submitted with the moving papers). Ms. Lalima testified that the area where plaintiff fell often became wet after pool classes concluded and members returned to the locker rooms, and that she personally alerted maintenance personnel in the building to this recurring condition on more than one occasion. From Ms. Lalima's testimony raises a question or questions

of fact appropriate for jury consideration as to whether defendants had actual notice of a recurring condition in the area where plaintiff fell. "Even absent proof that a defendant has actual knowledge of the condition on the date of the accident, a defendant's actual knowledge of the recurrent condition constitutes constructive notice of each specific recurrence" (*Erikson v. J.I.B. Realty Corp.*, 12 AD3d 344, 345 [2d Dept 2004]).

Finally, defendants cannot prevail on their motion on the assertion that the accumulation of water was merely incidental to the use of the pool and/or locker room. It is undisputed that plaintiff's accident occurred in a hallway one floor above the level where the pool was located, approximately 50 feet down the hall from where plaintiff exited the elevator and at the top of three steps which led down to the level of the locker room. Cases cited by defendants involving surfaces which were regularly submerged in water or areas immediately surrounding a pool are not analogous. Plaintiff had clearly left the pool area, and had not reached the level of the locker room. There is no evidence in the record to establish that water is necessarily incidental to the use of the pool and/or locker room.

In light of the above, it is hereby ORDERED that defendants' motion is denied.

The parties shall appear for settlement conference on January 10, 2019 at 9:15 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 5, 2018
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: Counsel of Record

VIA NYSCEF