Decongelio v Metro Fund, LLC
2019 NY Slip Op 30449(U)
February 25, 2019
Supreme Court, New York County
Docket Number: 158851/2014
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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DOROTHY DECONGELIO,

Plaintiff,

- v -

METRO FUND, LLC, *et al.*,

Defendants.

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INDEX NO. 158851/2014

MOTION DATE

MOTION SEQ. NO. 002, 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 71, 72, 73, 74, 79, 80, 81, 82, 83, 85

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 75, 76, 77, 78, 84, 86, 87, 88, 89

were read on this motion to/for summary judgment.

By notice of motion, defendant ABM Janitorial Services Northeast, Inc. s/h/a ABM Janitorial Services d/b/a ABM Industries, Incorporated (ABM) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. (Mot. seq. two). Plaintiff opposes the motion, and defendants Metro Fund, LLC, Silverstein Properties, Inc., The California State Teachers' Retirement System, 1177 Avenue of the Americas Acquisition, LLC, 1177 Avenue of the America Holdings, LLC, and Silverstein Metro Fund, LLC (collectively, Silverstein defendants) oppose it to the extent of opposing dismissal of their cross claims against ABM should ABM's motion to dismiss not be granted.

By notice of motion, Silverstein defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against them. (Mot. seq. three). Plaintiff opposes the motion.

The motions are consolidated for decision.

I. UNDISPUTED FACTS

On February 18, 2014, plaintiff, an employee of a tenant of premises at 1177 Avenue of the Americas in Manhattan, slipped on water while walking away from an elevator bank at the premises, and fell, sustaining serious injuries. The premises includes a large entrance lobby area, at the rear of which are security gates, which lead to an approximately 20-foot long corridor ending at the elevator bank where plaintiff fell. (NYSCEF 75).

On the date of the accident, the weather was snowy and rainy. Sometime in the morning, after arriving at work, plaintiff exited the elevator bank on her way out of the building, where she slipped on the wet floor. Plaintiff observed mats on the floor of the lobby area when she entered the building, but did not see mats or warning signs in the corridor. (*Id.*).

II. ABM'S MOTION

In a premises liability case involving an injury caused by a dangerous condition created by weather tracked into a building, a defendant must have either created the condition or had actual or constructive notice of it and a reasonable time to undertake remedial actions. (*Ford v Citibank, N.A.,* 11 AD3d 508 [2d Dept 2004]; *see also Amsel v New York Convention Ctr. Operating Corp*., 60 AD3d 534 [1st Dept 2009], *lv denied* 13 NY3d 710 [defendant established *prima facie* entitlement to summary dismissal by demonstrating that it was raining at time of accident and it had taken reasonable precautions to prevent tracked-in water by placing mats on lobby floor and mopping throughout day, and had neither actual nor constructive notice of wet condition at issue]).

During inclement weather, where moisture on the floor has been tracked into a building by people entering the building, the building owner has no actual notice solely by virtue of rain

being tracked into its building (*Garcia v Delgado Travel Agency*, 4 AD3d 204 [1st Dept 2004]), nor constructive notice, as the owner has no duty "to provide a constant remedy to the problem of water being tracked into a building in rainy weather" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 255 [1st Dept 2005]). Likewise, an owner is not liable for failing to cover the entire floor with mats. (*Kelly v Roza 14W LLC*, 153 AD3d 1187 [1st Dept 2017]). Rather, "all of the circumstances regarding a defendant's maintenance efforts must be scrutinized in ascertaining whether the defendant exercised reasonable care in remedying a dangerous condition." (*Pomahac v TrizecHahn 1065 Ave. of Americas, LLC*, 65 AD3d 462, 465-466 [1st Dept 2009]).

While plaintiff argues that given the ongoing storm, defendants had a duty to place mats the area where she fell, there is no such duty. (*Kelly*, 153 AD3d at 1187; *Garcia*, 4 AD3d at 204). In *Kelly*, it had been snowing when the plaintiff slipped and fell on a marble floor in the defendant's lobby. Mats had been placed in various locations but not in the area of the accident. The defendant owner had submitted evidence not only that mats had been placed, but that wet-floor warning signs were present, two porters were assigned to walk around the lobby and mop any wet areas, and the floor on which plaintiff had fallen was clean and dry 10 minutes before the accident. The Court held that the defendant had demonstrated, *prima facie*, that a reasonable cleaning routine had been followed on the day of the accident and that, therefore, the defendant could not be held liable. (*Kelly*, 153 AD3d at 1187).

Similarly, in *Pomahac*, the plaintiff had fallen in an area not covered by a mat. The Court rejected the argument that the defendants were liable for failing to place a mat in that area and dismissed the claim, finding that the defendants reasonably placed mats throughout the building's entrance and were not required to cover all of the floors with mats or "place a particular number of mats in particular places." (65 AD3d at 465; *see also Toner v Ntl. R. R.*

Passenger Corp., 71 AD3d 454 [1st Dept 2010] [defendants established that mats had been placed at bottom of staircase and workers mopped floor, and plaintiff failed to raise triable issue by allegation that mats' positioning left exposed area of floor]).

Here, ABM submits evidence of a cleaning routine that it follows when there is inclement weather, which includes the placement of mats and warning signs and constant patrolling and mopping of the floors by its porters. Moreover, its placement of the mats was reasonable as they were placed to cover the entire entrance lobby area leading to the security gates, approximately one to four pieces of 70-foot carpet each. It is reasonably inferred that tracked-in water is absorbed by the mats, so that by the time one reaches the corridor before the elevator bank, tracked-in water would be sufficiently absorbed. ABM also establishes that it had been raining before and at the time of plaintiff's fall and that it followed its cleaning procedures on the day of plaintiff's accident, thereby meeting its burden to show that it took reasonable precautions to prevent the accumulation of tracked-in water before plaintiff's accident.

Moreover, one of ABM's employees had inspected the area an hour before the accident and found no wetness, and according to a post-accident inspection, the floor was not wet. Thus, ABM demonstrates that it lacked actual or constructive notice of the wet condition that caused plaintiff's fall. (*See O'Sullivan v 7-Eleven, Inc.*, 151 AD3d 658 [1st Dept 2017] [defendants not liable as they demonstrated use of reasonable maintenance measures to prevent tracked-in moisture, by laying mat, placing orange cone on floor, and regularly mopping floor]; *Rosario v Prana Nine Props., LLC*, 143 AD3d 409 [1st Dept 2016] [as plaintiff testified that it was snowing minutes before her accident, "any issue concerning whether defendants made reasonable efforts to remedy the wet condition on the steps of the entry vestibule was beside the point since they had no duty to correct the ongoing problem of pedestrians tracking water into the vestibule until

a reasonable time after the storm ended"]; *Amsel v New York Convention Ctr. Operating Corp.*, 60 AD3d 534 [1st Dept 2009], *lv denied* 13 NY3d 710 [defendant established *prima facie* entitlement to dismissal by showing it had rained before and was still raining during accident, and it had taken reasonable precautions to prevent tracked-in water by placing mats on lobby floor and mopping through day, and had no actual or constructive notice of wet condition at issue]; *Gonzalez-Jarrin v New York City Dept. of Educ.*, 50 AD3d 334 [1st Dept 2008] [dismissal granted based on evidence that when plaintiff fell, it had been raining or snowing for several hours, they had placed mat on floor, and they had no actual or constructive notice of wet condition that caused fall]).

That plaintiff testified to having slipped on a wet floor does not raise a triable issue as to ABM's actual or constructive notice, absent any evidence of the source of the wetness or how long it had been there before her fall or that any complaints had been reported about it before the accident. (*See O'Sullivan*, 151 AD3d at 659 ["fact that it was snowing, with water and slush tracked in, does not constitute notice of a particular dangerous situation, warranting more than the laying of floor mats"]; *Gunzburg v Quality Bldg. Svces. Corp.*, 137 AD3d 424 [1st Dept 2016] [that it was raining and water was being tracked in did not constitute notice of dangerous condition]; *Garcia v Delgado Travel Agency Inc.*, 4 AD3d 204 [1st Dept 2004] [in absence of proof of how long wet condition existed, it could not be inferred that defendants had constructive notice of dangerously wet floor]).

Plaintiff's expert's affidavit is not probative absent his inspection of the premises or citation to any applicable regulations or engineering requirements which may have been violated by defendants. (*See Kelly*, 153 AD3d at 1188 [affidavit of plaintiff's expert failed to cite violation of accepted industry practice, standard, code, or regulation]).

III. SILVERSTEIN DEFENDANTS' MOTION

For the same reasons as set forth above (II.), Silverstein defendants may not be held liable for plaintiff's accident. Not only did they rely on ABM's cleaning routine for inclement weather conditions, but their employees also followed their own reasonable routine in placing mats and signs and surveilling and mopping the floors, and they had no actual or constructive notice of the wet condition on which plaintiff fell.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendant ABM Janitorial Services Northeast, Inc. s/h/a ABM Janitorial Services d/b/a ABM Industries, Incorporated for summary judgment is granted, and the complaint and all cross claims are dismissed as against said defendant with costs and disbursements to defendant to be taxed by the clerk upon submission of an appropriate bill of costs; and it is further

ORDERED, that the motion of defendants Metro Fund, LLC, Silverstein Properties, Inc., The California State Teachers' Retirement System, 1177 Avenue of the Americas Acquisition, LLC, 1177 Avenue of the America Holdings, LLC, and Silverstein Metro Fund, LLC for summary judgment is granted, and the complaint and all cross claims are dismissed as against said defendants with costs and disbursements to defendants to be taxed by the clerk upon submission of an appropriate bill of costs.

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2/25/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE