Morales v New York City Tr. Auth
2019 NY Slip Op 30601(U)
February 1, 2019
Supreme Court, New York County
Docket Number: 152704/2015
Judge: Lisa A. Sokoloff

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRANSIT PART 21

MICHAEL MORALES,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant.

DECISION AND ORDER

Index # 152704/2015

Mot. Seq. 3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant's Motion/ Affirmations/Memo of Law	1	39-53
Plaintiff's Memo of Law in Opposition	2	55-61
Defendant's Affirmation in Reply/Memo of Law	3	62-63

LISA A. SOKOLOFF, J.

In this personal injury action in which Plaintiff Michael Morales alleges injury from a slip and fall on subway stairs, Defendants New York City Transit Authority (Transit) and Metropolitan Transportation Authority (MTA) move for summary judgment pursuant to CPLR § 3212 and to dismiss the complaint on the grounds that Plaintiff failed to state a cause of action.

Plaintiff alleges that on September 4, 2012 at approximately 11:00 p.m., he was descending a staircase known as "S/W PL5B" at the Times Square-42nd Street station, to board a number 7 train, when midway, he tripped on a black plastic shopping bag. Plaintiff alleges that he catapulted over the railing and fell down several stairs. Only then did Plaintiff first noticed the bag attached to the tip of his shoe.

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law

(*Id.*). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Id.*) Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A defendant who moves for summary judgment in a slip and fall action has the initial burden of making a *prima facie* demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence (*Rosario v Prana Nine Properties, LLC*, 143 AD3d 409 [1st Dept 2016]). Transit argues that Plaintiff failed to show that Transit had actual or constructive notice of the alleged hazardous condition. However, it is not Plaintiff's burden in opposing the motion to establish that Defendant had actual or constructive notice of the hazardous condition. Rather, it is the defendants' burden to establish the lack of notice as a matter of law (*Giuffrida v Metro North Commuter R. Co.*, 279 AD2d 403 [1st Dept 2001).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Mitchell v City of New York*, 29 AD3d 372 [1st Dept 2006]). To meet its burden that it lacked 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 (*Sabalza v Salgado*, 85 AD3d 436 [1st Dept 2011).

Here, the Transit cleaner responsible for the Times Square station who worked the 10 p.m. to 6 a.m. shift on the date of the accident, testified that she followed a written schedule set by her supervisor which included cleaning all ramps, stairways and platforms for the 7 train at the station. She further testified that she cleaned all the stairs on her shift. The Cleaner also completed a Transit Cleaning Report in which she stated that she inspected the staircase S/W PL5A at 10:30 p.m. on the date of the accident and left it clean and dry. Although Plaintiff notes that the Cleaning Report did not refer specifically to S/W PL5B, the S/W PL5A staircase is adjacent to S/W PL5B, separated only by the handrail, and it is unlikely that the cleaner intended to identify only one side of the staircase and conceal the fact that debris was left on the other side. As Defendants have established, that they lacked constructive notice of the existence of the alleged hazard, the burden shifts to Plaintiff to raise a triable issue of fact as to the creation or notice of the defect.

Plaintiff argues that the Log Book and Inspection Reports of the Station Supervisor fail to establish when she last inspected the stairway prior to Plaintiff's accident. Further, her entries for the dates September 2, 2014 through September 5, 2015 do not reflect an inspection of the stairways for the 7 train and the stairs that were inspected at the Times Square station were given an "unsatisfactory" rating. However, this report provides nothing more than speculation that Defendants had notice of a hazardous condition (*Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008). Additionally, the Station Supervisor testified that she did not witness the accident, but that she inspected the area at 1:30 a.m. on September 5, 2014, two hours after Plaintiff's fall, and found it clean and free of defects. Plaintiff fails to provide evidence that the bag was on the stairs for a sufficient time for Transit to have discovered it.

Although Plaintiff attests that he frequently used stairway PL5B 5-8 over a 20-year during which he observed flyers, coffee cups and plastic bags similar to the one he tripped on the day of the accident, a general awareness that litter may be present is legally insufficient to charge Defendants with constructive notice of the bag Plaintiff tripped on (*Gordon v American Museum of Natural History*, 67 NY2d at 838; *Lance v Den-Lyn Realty Corp.*, 84 AD3d 470 [1st Dept 2011]; *cf. Lopez v New York City Housing Authority*, 255 AD2d 160 [1st Dept 1998] [plaintiff's proof tended to show that defendant negligently maintained staircase by failing to have in effect a clean-up schedule sufficiently frequent to avoid the creation of dangerous condition of which it had constructive notice]).

The Station Cleaner testified that the area was cleaned in accordance with the schedule and the Cleaning Report, prepared on the date of Plaintiff's accident, indicates that the area was left cleaned. Since Plaintiff did not see the bag before the accident occurred, he cannot establish how long it was there.

Accordingly, it is

ORDERED, that Defendants' motion for summary judgment is granted.

Any requested relief not expressly addressed has nonetheless been considered and is expressly rejected.

Dated: February 1, 2019
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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