Pedram v NYU-Hospital for Joint Diseases
2020 NY Slip Op 30199(U)
January 27, 2020
Supreme Court, New York County
Docket Number: 161603/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 161603/2015

SHOHREH PEDRAM,

Plaintiff,

MOTION SEQ. NO. 001

- v -

NYU-HOSPITAL FOR JOINT DISEASES, NYU HOSPITALS CENTER, NYU LANGONE HEALTH SYSTEM, and NEW YORK UNIVERSITY REAL ESTATE CORPORATION,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendant NYU Langone Hospitals, sued herein as NYU Hospital for Joint Diseases and NYU Hospitals Center, and defendant NYU Langone Health System, also sued herein as New York University Real Estate Corporation (collectively "defendants"), move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Shohreh Pedram opposes the motion. After a review of the motion papers, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an incident on November 3, 2015 in which plaintiff was allegedly injured when she slipped and fell near a passenger elevator bank on the 12th floor of the NYU Hospital for Joint Diseases ("the hospital" or "the premises"), located at 301 East 17th Street, New York, New York. Doc. 4. Plaintiff commenced the captioned action by filing a summons and verified complaint on November 10, 2015. Doc. 1. She then filed an amended summons and verified complaint on November 25, 2015, alleging that defendants were negligent in their ownership, operation, maintenance and/or control of the hospital. Doc. 4.

Defendants thereafter joined issue by their verified answer to the amended complaint, filed July 6, 2016, in which they denied all substantive allegations of wrongdoing and asserted numerous affirmative defenses. Doc. 22.

In her verified bill of particulars, plaintiff alleged that she fell because "defendants improperly applied wax to the 12th floor." Doc. 47 at par. 16. She claimed that defendants were negligent in: "allowing an unreasonably dangerous, hazardous and slippery condition; namely, an accumulation of floor cleaning wax, to exist [at] the subject premises for an unreasonable length of time"; failing to timely and adequately remove floor cleaning wax; failing to place warning signs in the area; and failing to properly inspect the area. Doc. 47 at par. 19. Although plaintiff alleged that defendants had actual and constructive notice of the dangerous condition (Doc. 47 at pars. 17), she also claimed that it was not necessary for her to prove notice given her claim that defendants created the condition. Doc. 47 at par. 21.

At her deposition in April 2017, plaintiff testified that she was injured on the morning of November 3, 2015 when she slipped and fell after exiting an elevator on the 12th floor of the hospital. Doc. 52 at 48-49, 59-60, 77. Plaintiff was on her way to see her husband, a patient in

the hospital. Doc. 52 at 50. After plaintiff exited the elevator on the 12th floor, she took a few steps, and then her "left leg went under [her] right leg and [she] fell down" between the elevator and a nurses' station. Doc. 52 at 67, 75, 77, 80-81, 89-90. Although she initially said that she did not know what caused her to fall, she recalled that a nurse at the scene said that the floor was wet. Doc. 52 at 84-85, 92-93. She did not see anything on the floor before the incident, but saw an unidentified white substance on her jacket after she fell. Doc. 52 at 90-92, 95. She photographed the white substance with her cell phone, but deleted the photo when her attorney told her that it was "not significant", dry cleaned the jacket, and never learned what the substance was. Doc. 52 at 91-92.

Plaintiff maintained that, while on the floor, she noticed that it was wet. Doc. 52 at 99-100. Although she did not know what the liquid was, where it came from, or how long it had been on the floor, she maintained that it caused her fall. Doc. 52 at 101-102.[1] She admitted that she did not see or touch any wetness on the floor after she fell and concluded that it was wet because "[i]t couldn't have been anything else to have caused my fall" (Doc. 52 at 105) and "[w]hat else could have caused me to fall?" Doc. 52 at 99-100.

She did not recall whether the area in which she fell was dull or shiny (Doc. 52 at 68-69) and did not "notice" or "pay attention" to any warning signs in the area. Doc. 52 at 85, 98-99; Doc. 53 at 149. Although she walked in that area several times before the date of the accident, she did not fall or notice any dangerous condition in that area. Doc. 52 at 86-87. Prior to the accident, she never saw anyone cleaning the area where she fell, complained to defendants about that area, or learned that anyone else had fallen in, or complained about, said location. Doc. 52 at 69-70, 87.

[1] As noted above, plaintiff initially testified that she did not know what caused her to fall.

Manuel Patino was deposed on behalf of the defendants in March 2018. He testified that, as of the date of the alleged incident, he worked 6 a.m. to 2 p.m. daily. Doc. 54 at 14. Typically, when he arrived at work each day his supervisor told him what he needed to do. Doc. 54 at 16-17. The vinyl tiles on the 12th floor were "stripped" periodically, depending on when his supervisor determined that it was needed. Doc. 54 at 19-21. On the date of the incident, he "shower scrubb[ed] the area of the 12th floor located near the elevators. Doc. 54 at 52. He explained that this process cleaned the top surface of the floor. Doc. 54 at 52-53. To do so, he first used a "side-by-side" machine, which was used to deep clean specific areas of the floor. Doc. 54 at 31. He then used a Tennant T2 auto scrubber ("T2") to further clean the area as well as to pick up "any extra solution that might be on the floor with water." Doc. 54 at 30, 51-54, 68. The T2 not only scrubbed the floor but had a built-in wet vac which removed water from the floor. Doc. 54 at 30, 68. Patino said that the T2 picked up 99% of the water from the floor and that he dry mopped the area after using that machine to ensure that all moisture had been removed from the floor. Doc. 54 at 58, 68. He never put any liquid other than water into the T2 or the side-by-side machine. Doc. 54 at 33, 54. After he finished cleaning on the 12th floor, Patino placed two wet floor caution signs in the area where he worked. Doc. 54 at 69-70. One was in the middle of the elevator bank and one was in the middle of the corridor across from the elevator bank. Doc. 54 at 70.

Nakia Chambers, the hospital's Supervisor of Environmental Services on the date of the incident, was also deposed on behalf of defendants. She was notified about the accident by telephone shortly after it occurred and, when she went to the 12th floor elevator bank, she saw wet floor warning signs there and was notified by a housekeeper that someone had fallen. Doc. 55 at 8-10, 13, 27. Chambers admitted that Patino was completing a "floor care assignment" in the area where the person fell but, despite looking for any residual wetness, she did not notice any water in

that location. Doc. 55 at 11, 14, 26-27. She also recalled that the floor was not slippery. Doc. 54 at 35.

Plaintiff filed a note of issue and certificate of readiness on May 1, 2019. Doc. 39.

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, defendants submit, inter alia, the pleadings; an attorney affirmation; affidavits by, and the deposition transcripts of, Patino and Chambers; plaintiff's bill of particulars; and the hospital's surveillance video of the incident, as well as of Patino using the T2 and side-by-side machine and mopping before plaintiff fell.

In his affidavit in support, Patino represents that, as portrayed in the video, which was recorded by the hospital's security department in the regular course of its business, he began cleaning the area in question at 9:12 a.m. and finished at 9:36 a.m. Doc. 43. Before he began work in the area, he placed a caution/wet floor sign in the middle of the elevator bank. Doc. 43. When he finished cleaning with the machines, he dry mopped the area "to ensure that the floor was completely dry." Doc. 43. When he finished the job, he placed one caution/wet floor sign in the middle of the elevator bank and another in the middle of the hallway adjacent to the elevator bank. Doc. 43. He further maintains that he never observed, or received complaints about, the condition of the floor in that area prior to the date of the incident. Doc. 43.

Chambers states in her affidavit in support that, when she responded to the accident scene, she saw "caution/wet floor signage" but "tested the floor" and observed no water or other slippery condition there. Doc. 44. She, too, represented that the video was maintained in the regular course of the hospital's business and that she neither knew of any complaints nor of any accidents in that location prior to plaintiff's fall. Doc. 44.

In support of the motion, defendants argue that they are entitled to summary judgment because they neither created, nor had actual and/or constructive notice of, any condition which caused plaintiff's fall. They further assert that plaintiff was unable to identify the cause of her fall. Alternatively, defendants argue that even assuming, arguendo, that a dangerous condition existed, they cannot be liable since Patino placed warning signs in the area.

In an attorney affirmation in opposition to the motion, plaintiff asserts that she fell because the floor was slippery, and that the video establishes that the area was cleaned right before the incident. Plaintiff further argues that, if Patino did not create the condition, then it would not have been necessary for him to place wet floor signs in the area. Specifically, plaintiff claims that "[t]he reason the [warning] signs were placed was because the surface of the floor had been made wet and excessively polished/buffed, and the hospital staff was aware of this created condition." Doc. 58 at par. 8. Further plaintiff maintains that the placement of warning signs, in and of itself, does not negate defendants' liability for creating the dangerous condition, but rather creates a question of fact regarding whether defendants took adequate safety precautions. Doc. 58 at par. 10.

In reply, defendants reiterate their argument that plaintiff's complaint must be dismissed because she did not know what caused her fall. Doc. 60. Additionally, defendants maintain that their motion must be granted because plaintiff failed to raise an issue of fact regarding whether defendants created the allegedly dangerous condition. Doc. 60. In support of this claim, defendants emphasize that the video shows several people walking in the area in question without incident minutes before plaintiff's fall. Doc. 60.

LEGAL CONCLUSIONS

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact." *Alvarez v Prospect Hospital,* 68 NY2d 320, 324 (1986); *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the movant has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). The court's function on summary judgment is "issue-finding rather than issue-determination" (*Mayo v Santis*, 74 AD3d 470, 471 [1st Dept 2010]). In deciding the motion, the court should draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989] [citations omitted]). "'[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" to defeat a motion for summary judgment (*Siegel v City of New York*, 86 AD3d 452, 455 [1st Dept 2011], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

> To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of, the dangerous condition that precipitated the injury *(see Mercer v City of New York*, 88 NY2d 955, 956 [1996]; *Kelly v Berberich*, 36 AD3d 475, 476 [1st Dept 2007]). 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 dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence (*see Manning v Americold Logistics*, LLC, 33 AD3d 427 [1st Dept 2006]).

Ceron v Yeshiva Univ., 126 AD3d 630, 631-632 (1st Dept 2015).

Defendants' motion must be granted on several grounds. Initially, defendants have established their prima facie entitlement to summary judgment by demonstrating that they neither created, nor had actual or constructive notice of, the alleged condition. *See Smith v Costco Wholesale Corp.*, 50 AD3d 499 (1st Dept 2008). Specifically, defendants submit the deposition testimony and affidavit of Patino, which demonstrate that he cleaned the area in question with the T2 and side-by-side machines, and then mopped the area, placing the second warning sign in the area at 9:36 a.m., just eight minutes before plaintiff slipped and fell at 9:44 a.m. This is confirmed by the surveillance video, which shows Patino cleaning and mopping the area in such fashion. The video also shows two yellow caution signs in the area where plaintiff fell and several other people walking in the area without incident.[2] *See Fernandez v JP Morgan Chase Bank, NA,* 170 AD3d 445 (1st Dept 2019) (summary judgment granted to defendant where surveillance video showed plaintiff and other customers walking without incident in the allegedly dangerous area during the half hour before plaintiff fell); *Brown v New York Marriott Marquis Hotel*, 95 AD3d 585 (1st Dept 2012) (no liability where caution sign placed on landing after area was mopped); *Gale v BP/CG Ctr. I LLC*, 49 AD3d 454 (summary judgment granted to defendant where several people walked through area where plaintiff allegedly fell without incident between time area was mopped and time of plaintiff's alleged fall).

Additionally, Patino states in his affidavit that, when he completed his work on the 12th floor on the day of the incident, the area was completely dry. Doc. 43 at par. 6. *See Mahal-Sharpe v Riverbay Corp.*, 126 AD3d 573 (1st Dept 2015) (summary judgment granted to defendant where defendant's janitorial supervisor submitted affidavit that he inspected the area before the incident and found it to be clean and dry). Moreover, plaintiff admitted that she had never seen a dangerous

[2] Plaintiff does not dispute that the yellow warning signs were present; she merely asserts that she did not "notice" or "pay attention" to them.

condition in the area before she fell and that she knew of no complaints about, or injuries arising from, the condition of the area, which testimony was consistent with that of Patino and Chambers. Thus, defendants did not create or have actual or constructive notice of any allegedly dangerous condition.[3]

Additionally, as defendants assert, the complaint must be dismissed since plaintiff failed to identify what caused her fall. *See Glueck v Starbucks Corp.*, 173 AD3d 450 (1st Dept 2019). Plaintiff initially testified that she did not know what caused her fall, but then said that a nurse at the scene, who has never been identified, said that the floor was wet. Admittedly, plaintiff did not see anything on the floor before the incident but claims to have seen an unidentified white substance on her jacket after she fell. Although she photographed the white substance with her cell phone, she deleted the photo when her attorney told her that it was "not significant", dry cleaned the jacket, and never learned what the substance was.[4]

Although plaintiff claims that the ground where she fell was wet, and that this wetness caused her fall, she concededly did not know what the liquid was, where it came from, or how long it had been on the floor. Doc. 52 at 101-102. She admitted that she did not see or touch any wetness on the floor after she fell but insisted that it was wet because "[i]t couldn't have been anything else to have caused my fall" and "[w]hat else could have caused me to fall?" However, such speculation is clearly insufficient to raise an issue of fact in opposition to a motion for summary judgment. *See Mahal-Sharpe v Riverbay Corp.*, 126 AD3d at 573; *Smith v Costco Wholesale Corp.*, 50 AD3d at 501.

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[3] As noted previously, plaintiff concedes that actual and constructive notice are irrelevant herein since defendants allegedly created the hazardous condition. Doc. 58 at par. 9.

[4] Although defendants did not raise the issue of spoliation, this Court notes that plaintiff's failure to preserve any evidence that there was a white substance on her jacket undermines her claim that the said substance caused or contributed to her fall.

Finally, although not raised by defendants, this Court notes that all of the allegations of negligence set forth in the bill of particulars arise from the application of wax on the hospital floor. Doc. 47. However, since there is no evidence of the application of wax, much less the negligent application thereof, the complaint must be dismissed.

In opposing the motion, plaintiff relies, inter alia, on *Firment v Dick's Sporting Goods, Inc.*, 160 AD3d 1259 (3d Dept 2018). However, plaintiff's reliance on that case is misplaced since there is no evidence in this case that the floor where plaintiff fell was excessively wet or that the signs placed in the area where Patino worked were inadequate.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant NYU Langone Hospitals, sued herein as NYU Hospital for Joint Diseases and NYU Hospitals Center, and defendant NYU Langone Health System, also sued herein as New York University Real Estate Corporation, seeking summary judgment pursuant to CPLR 3212 is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

1/27/2020
DATE

KATHRYN E. FREED, 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