Williams v Beth Israel Hosp. Assn.
2020 NY Slip Op 34418(U)
December 8, 2020
Supreme Court, Bronx County
Docket Number: 24577/15E
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
LISA WILLIAMS,

Plaintiff,

-against-

BETH ISRAEL HOSPITAL ASSOCIATION, BETH ISRAEL MEDICAL CENTER and MOUNT SINAI HOSPITALS GROUP,

Defendants.

Index No. 24577/15E

DECISION/ORDER

Present:
HON. ELIZABETH A. TAYLOR

The following papers numbered 1 to ___ read on this motion, _____

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Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

The branch of the motion pursuant to CPLR 3212 for an order dismissing the complaint against defendant Mount Sinai Hospitals Corp., on the ground that it did not own or maintain the premises, is granted without opposition.

The branch of the motion pursuant to CPLR 3212 for an order dismissing the complaint against the remaining defendants, on the ground that there are no triable issues of fact, is denied.

The branch of the motion pursuant to CPLR 3025 for leave to amend defendants' answer, is granted as follows.

The branch of the motion pursuant to CPLR 3211 (a)(2) and (7) for an order dismissing the complaint, is denied as follows.

Plaintiff commenced this personal injury action seeking damages for injuries allegedly sustained, as a result of a trip and fall accident that occurred on defendants' premises, on March 13, 2015. Plaintiff alleges that on March 13, 2015, she injured her left knee when she tripped and fell in the vestibule of the main entryway to the hospital facility commonly known as Beth Israel Medical Center (hereafter, "BIMC"). Defendants move, primarily, to dismiss the complaint.

Although plaintiff will bear the burden at trial of proving the defendants' negligence, on this motion, defendants bears the initial burden of establishing lack of negligence on their part.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3213, subd [b])" (*Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]).

In support of the motion, defendant submits, *inter alia*, the deposition transcripts of: 1) plaintiff; 2) Carlos Aviles, an environmental service worker at BIMC; and 3) Derek McMahon, BIMC's former Director of Environmental Services. Plaintiff testified that she is a certified nursing assistant ("CNA") and had been employed since 2012 by non-party Advanced Care, a staffing agency, which had assigned her to work at multiple

healthcare facilities over the years. She was paid an hourly wage by Advanced Care, and listed Advanced Care and similar staffing agencies as her employers on her tax returns. A few months before her accident, Advanced Care assigned plaintiff to work at BIMC as a patient companion. She attended an orientation during her first week, and was thereafter given a companion assignment each day when she arrived at BIMC. BIMC issued an ID tag to plaintiff, but she supplied her own uniform and footwear. Although plaintiff did not recall the name of her BIMC supervisor, she also had a supervisor at Advanced Care named "JoAnn" during her BIMC tenure.

Plaintiff further testified that on the date of her accident, she arrived at BIMC's main lobby entrance and while passing through the vestibule between the first and second set of doors, her foot got "hitched" or held back on the floor mat, causing her to fall forward and land on her left knee. After the fall, plaintiff observed that her foot had gotten hooked on a "rise" or "wrinkle" in the mat. Plaintiff did not notice this hazard before she tripped. She had also seen the mats in the lobby and vestibule areas on many prior occasions, as they were often laid down during inclement weather. Plaintiff subsequently applied for and received workers' compensation benefits.

Carlos Aviles, an environmental services worker at BIMC, testified that his general maintenance responsibilities included putting down mats in the lobby during inclement weather, and replacing soiled or damaged mats, as needed. The mats did not adhere to the floor. Although on occasion, Mr. Aviles would readjust a mat into a proper walking position after people had walked over it, he never noticed a mat having

ripples, or buckles, or anything that lifted it off the ground, nor was he aware of any instance in which a mat did not lie perfectly on the ground. Mr. Aviles did not keep a written log of his maintenance activities, nor did he know if there was any set schedule for regularly changing the mats. Mr. Aviles had no recollection of plaintiff's accident, or of any security guards or other witnesses who may have been present in the lobby that day. Mr. Aviles had not heard of any complaints about the mats in his nearly 20 years on the job.

Derek McMahon, BIMC's former Director of Environmental Services, testified that the mats used in the lobby vestibule were standard removable "rubber walk-off" mats, measuring five feet by 10 feet, with carpet fiber on top and rubber on the bottom. BIMC did not use any adhesive to affix the mats to the lobby floor. BIMC received the mats from a rental company, which brought fresh mats, and retrieved the soiled ones, on a weekly basis. Mr. McMahon oversaw staff whose responsibilities included inspecting and maintaining the lobby and vestibule areas. He never saw the floor mats in these areas move or shift. Mr. McMahon and his daytime supervisor walked through the lobby several times daily. It was not BIMC's practice to keep a log of complaints about the mats in these areas, but to simply respond to and correct any conditions, if needed. Mr. McMahon did not recall any incidents of accidents in the lobby or vestibule areas due to the floor mats.

Plaintiff filled out an injury report on the date of the accident, using a form provided by BIMC. The form is entitled "Employee Accident Report," but the first word

is crossed out and replaced with "Agency Staff." The claim form that plaintiff submitted to the State Workers' Compensation Board lists BIMC's name and address in the section for employer. The Board's decision providing for payment to plaintiff's medical providers lists Advance Care Staffing as her employer.

It is well settled that landowners owe a duty of care to maintain their property in a reasonably safe condition (*see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]; *Peralta v Henriquez*, 100 NY2d 139, 144 [2003], *Basso v Miller*, 40 NY2d 233, 241 [1976]). Liability for injuries caused by an unsafe condition on real property is thus "predicated upon ownership, occupancy, control, or a special use of such premises" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]). It is undisputed that defendant Mount Sinai Hospitals Group Inc., s/h/a "Mount Sinai Hospitals Group" (hereafter, "Mt. Sinai") does not own, any real property, have any employees, or provide any maintenance or management services for any real property. Accordingly, the complaint shall be dismissed against defendant Mount Sinai Hospitals Group as it did not own or control the subject premises.

The branch of the motion pursuant to CPLR 3212 for an order granting summary judgment to the remaining defendants, is denied.

As an initial matter, plaintiff argues that defendants cannot rely on the testimony of Mr. Aviles and Mr. McMahon because they did not sign the EBT transcripts, and defendants did not submit proof that the witnesses were sent the transcripts and failed to sign and return them within the applicable 60-day period (*see* CPLR 3116[a]),

thereby rendering them inadmissible. However, the transcripts were certified by the stenographers who transcribed them, and so they were in admissible form (*see id*; *Singh v NY City Hous. Auth.*, 177 AD3d 475, 475 [1st Dept 2019] ["A movant's submission of its own deposition testimony is deemed to be an adoption of such testimony as accurate, and therefore admissible."]).

"A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). "To constitute constructive notice, a defect must be visible and apparent," and "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, 837 [1986]). In a slip/trip-and-fall case "[a] defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross*, 86 AD3d at 421; *see also Williams v New York City Hous. Auth.*, 99 AD3d 613, 613 [1st Dept 2012] [summary judgment denied because defendant did not present competent evidence that its janitorial schedule was followed on the accident date]). Such evidence must be proffered by someone with personal knowledge as to the inspection and remedial conduct which actually occurred (*see Joachim v AMC Multi-Cinema Inc.*, 129 AD3d 433, 434 [1st Dept 2015] [where manager kept no written log of

inspections, vague testimony that he inspected the premises "about once a week" is insufficient to satisfy summary judgment burden]). Evidence of a defendant's general practices is insufficient, as it is not probative of the care actually exercised on the date of an accident (*see De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [1st Dept 2010] [summary judgment burden not met by manager's "generalized testimony" as to inspection and remedial measures, nor by foreman's affidavit "framed in the conditional tense" -- describing what he "would have done," rather than "what he actually did"]).

Defendants' *prima facie* showing is inadequate because neither Mr. McMahon nor Mr. Aviles testified to specific evidence of the maintenance activities that occurred on the date of the accident. They also confirmed that BIMC did not keep any written logs or other records of inspections. In addition, Mr. McMahon's testimony that he regularly walked through the area and would correct any dangerous condition that he observed was insufficient to establish that the vestibule was inspected and found to be free of any tripping hazards shortly before the accident. Defendants' failure to establish when the vestibule was last inspected before plaintiff's accident necessarily means that they failed to affirmatively demonstrate that the hazardous condition did not exist, so as to satisfy their *prima facie* burden to show a lack of constructive notice. Accordingly, the branch of the motion for summary judgment in favor of the remaining defendants is denied.

The branch of the motion pursuant to CPLR 3025 for an order granting defendants leave to amend their answer to assert a defense based on the exclusive

remedy provisions of WCL 11 and 29(6), and to have the proposed amended answer deemed served *nunc pro tunc*, is granted as follows.

After the time within which to respond to a pleading has expired, a party may amend its pleading only by stipulation of all parties or with leave of court (*see* CPLR 3025[b]). Leave to amend "is to be freely given, absent prejudice or surprise" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]), so long as the proposed amendment is not "palpably insufficient or patently devoid of merit" (*Y.A. v Conair Corp.*, 154 AD3d 611, 612 [1st Dept 2017]). "Mere delay in seeking to amend a pleading does not warrant denial of the motion, in the absence of prejudice" (*Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420, 420 [1st Dept 2014]), although an extended delay will usually require supporting affidavits presenting a reasonable excuse for the delay and a showing of merit (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 479-480 [1st Dept 2014]); *Alcala v Soundview Health Ctr.*, 77 AD3d 591, 591 [1st Dept 2010]; *Cherebin*, 43 AD3d at 365; *cf. Torres v NY City Tr. Auth.*, 78 AD3d 419, 419-420 [1st Dept 2010] [despite failure to proffer a reasonable excuse for extended delay, leave to amend bill of particulars ("BP") granted due to lack of prejudice to the defendant, as original BP provided notice of the accident theory that plaintiff sought to add, and court vacated note of issue, granting defendant additional discovery]).

It is noted that defendants made the instant motion on the 120th day after the note of issue was filed, and more than four years after they served the original answer. Defendants have thus engaged in an extended delay, for which they have not offered

an excuse. However, this is not fatal to the application (*see Torres*), since the conflicting evidence in the record on plaintiff's potential status as BIMC's special employee amply evinces that the proposed defense is not utterly devoid of merit. These unresolved factual questions also raise the potential of prejudice, insofar as defendants' dilatory assertion of this defense has deprived plaintiff of the opportunity to conduct disclosure on the issue. Although defendants argue that there is no prejudice to the belated assertion of a defense based on workers' compensation exclusivity, that is generally true when the plaintiff is the defendant's direct employee, such that there would be no need to conduct discovery on such a clear cut issue (*see e.g. Caceras v Zorbas*, 74 NY2d 884 [1989] [no prejudice in granting motion even after jury selection, where plaintiff had always been aware of his status as defendant's employee and knew that he had accepted workers' compensation benefits]). In contrast, "special employment will not be found absent a clear demonstration of surrender of control by the general employer and assumption of control by the special employer," and "[w]hether such a complete transfer of control has occurred is ordinarily a fact-sensitive inquiry. . ." (*Bellamy v Columbia Univ.*, 50 AD3d 160, 161-162 [1st Dept 2008] [quotations omitted] [summary judgment denied due to factual issues as to whether defendant had "assumed exclusive control over the manner, details and ultimate result of the employee's work"]; *see also Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 597 [1st Dept 2013] [same, noting that the general employer, and "not defendant, paid and provided benefits to (the plaintiff)"]).

The court notes that some of the pertinent questions left unresolved due to the lack of factual development in this record include: the identity of plaintiff's BIMC supervisor (whose name plaintiff did not recall during her EBT) and how he or she may have supervised plaintiff's work; the nature and extent of the control exhibited by the BIMC supervisor, as contrasted with that exhibited by her Advance Care supervisor; and the existence of any written agreement between Advance Care and BIMC, which may bear on the special employment status of staffing employees. Plaintiff should have the opportunity to at least obtain disclosure on a fact-sensitive issue raised at this late hour, after she is properly served with the amended answer. Accordingly, the court grants defendants leave to amend their answer, and also grants plaintiff the choice between: 1) 60 days, from service of a copy of this order with notice of entry, to conduct disclosure on this limited issue; or 2) leave to make a motion to vacate the note of issue, within 20 days of service of this order with notice of entry, to conduct disclosure as it pertains to this defense (*see Williams v Tompkins*, 132 AD3d 532, 533 [1st Dept 2015] [granting leave to amend answer and directing that the parties may seek further discovery in light of the amendment, noting that discovery was not yet complete when defendant made the motion]).

Accordingly, the branch of the motion pursuant to CPLR 3211 (a)(2) and (7) for an order dismissing the complaint is denied as there remain issues of fact as to plaintiff's employment status.

Within 10 days of the date of this order, movants shall: 1) file the amended

answer; and 2) serve the amended answer upon all parties.

The Clerk is directed to dismiss the action against defendant Mount Sinai Hospitals Group, and amend the caption accordingly.

The foregoing shall constitute the decision and order of this court.

Dated: DEC 08 2020

J.S.C.

☒ Motion is granted in part and denied in part
☒ Amend the caption to reflect that the action was dismissed against Mount Sinai Hospitals Group
☒ Action is still active