Briggs v PF HV Mgt., Inc.
2020 NY Slip Op 34797(U)
August 31, 2020
Supreme Court, Ulster County
Docket Number: Index No. EF2018-1507
Judge: Lisa M. Fisher
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STATE OF NEW YORK
SUPREME COURT ULSTER COUNTY

JASON BRIGGS,
Plaintiff,

- against -

PF HV MANAGEMENT, INC., PLANET FITNESS and/or PLANET FITNESS, INC.,
Defendants.

DECISION & ORDER

Index No.: EF2018-1507
RJI No.: 55-18-1620

PRESENT: HON. LISA M. FISHER:

APPEARANCES: John G. Rusk, Esq.
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FISHER, J.:

Plaintiff brought this premises liability action seeking to recover for personal injuries he sustained on March 28, 2018, when he was allegedly caused to slip and fall in the shower locker room at Defendants' workout and gym facility known as Planet Fitness. Plaintiff contends he finished his workout and went into the locker room to shower as he normally did. He undressed and prepared to take a shower in the middle stall. He was barefoot. He testified he walked into the shower area and was attempting to go into the middle (third) shower. He claims he slipped and fell in the area just before he got into the shower stall. He testified that, after he fell, he took several photographs (three) of a puddle that was about one foot by two feet and approximately three to four feet from the shower shall. He believes the subject accident occurred just before 9:00 p.m.

Plaintiff testified that he did not see the puddle before he fell and, when asked if he stepped in the puddle, he responded "I would assume so." When further questioned if he did not know that he stepped into the puddle, he responded "I don't know because I didn't see the puddle, my eyes

were looking where I was going." Plaintiff testified that the surrounding ground near the puddle was mostly wet all over. After his fall, Plaintiff got dressed and went to the front counter to advise them of his injury.

Defendants' shift supervisor on duty that night was John Taylor. The subject accident is very salient to Mr. Taylor because he was in the process of being promoted, had classes that night after his shift at 9:30 p.m., and remembers this accident very well because "not a lot of big things happen there." He testified to Defendants' policy requiring a walkthrough to clean and to inspect the premises every 20 to 30 minutes. Rounds were generally required at 8:30 p.m, 9:00 p.m., and 9:30 p.m. Mr. Taylor recalled he did the 9:00 p.m. round because he was leaving at 9:30 p.m. and he was responsible for the round thirty minutes prior to his shift ending. He said rounds took about 10 minutes and he had a habit of starting his walkthrough three minutes before the time, which in this case it would have been 8:57 p.m. He remembers performing the round and seeing Plaintiff's duffel bag on the floor and his locker open. He normally would have taken the duffel bag to the front desk per Defendants' policy on loose objects in the locker room, but he does not do that when there is a person showering because he assumes that it is their duffel bag.

Mr. Taylor remembers dry mopping the shower area. He observed Plaintiff "getting into the shower" in the third stall. He recalls that the shower was on, the curtain was open, and Plaintiff was de-robed and doing something on his phone, possibly texting. He specifically knows who Plaintiff is because they have talked about sports and the fact that Plaintiff has a "Yankees" tattoo on his shoulder but wears Boston Red Sox t-shirts; both are New England Patriot fans and they talk sports. However, he did not speak to the Plaintiff at the showers that night. Mr. Taylor returned to the front desk at approximately 9:07 p.m. – 9:08 p.m. when he signed the maintenance log.

Mr. Taylor testified that at approximately 9:15 p.m. the Plaintiff came out and reported the subject accident. He remembers the time because he had to go at 9:30 p.m. to class and remembered thinking that this would not take less than 15 minutes, implying he would be late. Mr. Taylor went in and only saw water in front of the third shower stall that was consistent with a person coming out of the shower and drying off, not necessary a puddle. The other four shower stalls and areas were dry. He took photographs and attached it to the incident report. Overall, Mr. Taylor does not believe that Plaintiff fell going into the shower but either coming out of the shower when wet or was injured somewhere else. He bases this opinion on the fact that Plaintiff told other

employees different stories, his observations of Plaintiff about to step into the shower, and the timeframe of his walkthrough, seeing Plaintiff about to step into the shower, and Plaintiff coming out.

Defendants' general manager was Justin Milian, who worked that day but was not at the facility at the time of the subject accident. He testified that the walkthroughs were generally done every 30 minutes, but usually they would send someone in there every 10 to 15 minutes to check. On the night of the subject accident, Mr. Milian testified both the 8:30 p.m. and 9:00 p.m. walkthroughs and forms were completed. He remembered receiving a call from Mr. Taylor about Plaintiff's fall at 9:00 p.m.

Defendants testified there was a slip and fall caution sign in the shower area. There is photographic evidence of same. Plaintiff testified he has seen that sign in the shower area, but he did not remember if he saw it on the date of the subject accident or some other time. After Plaintiff went to the hospital, Defendants' recovered the duffel bag that Mr. Taylor saw during his 9:00 p.m. round in the locker room. That duffel bag was indeed Plaintiff's bag.

Present Applications

Now, Defendants move for summary judgment pursuant to CPLR R. 3212 on several grounds, including that they complied with building or maintenance codes and that the tiles had the proper friction coefficient, to which Defendants contend Plaintiff's expert disclosure and report fail to competently rebut. Defendants indicate that Plaintiff's bill of particulars did not allege Defendants created the alleged condition or that Defendants had actual notice, and further that they did not have constructive notice of a dangerous condition considering that Defendants' employees did a walkthrough and round "minutes" from when Plaintiff fell. Defendants also highlights that there were wet and slip/fall warnings in the locker room, particularly the shower area, which Plaintiff does not dispute. Defendants further argue they were not obliged to place down mats. In fact, when experimenting with mats in the past, they found that it actually made the surface more slippery.

Plaintiff opposes the application but also cross-moves to strike Defendants' answer on spoliation. The claim of spoliation argues that Defendants' improperly deleted the surveillance video of the lobby, as well as the maintenance check sheets, when litigation was reasonably foreseeable. Plaintiff contends that this is a material fact that would prove or disprove whether Defendants' employees performed the 9:00 p.m. round, and whether the subject accident occurred

before or after the 9:00 p.m. round. Plaintiff also contends that Defendants did not test or have evidence of the friction coefficient, nor did they address the improper locker room/shower floor slope issue raised by Plaintiff's expert. Further, Plaintiff alleges that Defendants failed to put down mats to create a slip-resistance surface. Plaintiff's expert provides examples of what he alleged Defendants should have done.

Defendants' submit a reply and opposition to the cross-motion, arguing that Plaintiff's expert never made a site visit and used an improper building code to conjure a slope issue on the floor. While Defendants' rebut the spoliation argument, they further that, notwithstanding the 9:00 p.m. walkthrough, it is uncontroverted that Defendants' employees performed the walkthrough round at 8:30 p.m. which was approximately 30 minutes before Plaintiff's subject accident, according to Plaintiff who testified he fell a little before 9:00 p.m.. Therefore, Defendants contend that 30 minutes is also insufficient for them to have constructive notice. Plaintiffs' submit a reply in further support, largely furthering their argument on spoliation.

Legal Analysis

To establish a *prima facie* entitlement to judgment as a matter of law, a moving party must present proof in admissible form to demonstrate the absence of any triable issues of fact as to each and every allegation in the complaint and bill of particulars. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *accord Hollis v Charlew Const. Co., Inc.*, 302 AD2d 700 [3d Dept 2003]; *Balnys v Town of New Baltimore*, 160 AD2d 1136, 1136 [3d Dept 1990] [noting the movant must come "forward with competent proof refuting the allegations of the complaint as amplified by the bill of particulars."].)

In a premises liability matter, "[t]o establish a prima facie entitlement to summary judgment, defendant was required to show that it maintained its property 'in a reasonably safe condition and that [it] neither created nor had actual or constructive notice of the allegedly dangerous condition'" (*Lucatelli v Crescent Assoc.*, 132 AD3d 1225, 1225 [3d Dept 2015], quoting *Decker v Schildt*, 100 AD3d 1339, 1340 [3d Dept 2012]; *see also Basso v Miller*, 40 NY2d 233 [1976]). "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 defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]; *see also McMullin v Martin's Food of S. Burlington, Inc.*, 122 AD3d 1103, 1104 [3d Dept 2014]).

"A defendant may demonstrate a lack of constructive notice by offering evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Beck v Stewart's Shops Corp.*, 156 AD3d 1040, 1041 [3d Dept 2017] [internal citation and quotation omitted]). Generally, 20 to 40 minutes has been an insufficient amount of time to demonstrate constructive notice in similar matters. (*See Maurer v John A. Coleman Catholic High Sch.*, 91 AD3d 1168, 1169 [3d Dept 2012] [finding no constructive notice where the plaintiff fell about **30 minutes** of opening when the entre area had been inspected that morning prior to opening]; *Cochetti v Wal-Mart Stores, Inc.*, 24 AD3d 852, 852 [3d Dept 2005] [finding no constructive notice where "safety sweep" was performed **one-half hour** prior to the plaintiff's fall and did not reveal the unidentified substance]; *Lewis v Bama Hotel Corp.*, 297 AD2d 422, 423 [3d Dept 2002] [finding no constructive notice where alleged icy condition developed within **one hour** of the time that the plaintiff went into the restaurant and came back out to fall on it]; *Dominy v Golub Corp.*, 286 AD2d 810, 810 [3d Dept 2001] [finding no constructive notice where the plaintiff fall on a large puddle of water on the floor when the defendant's employee inspected the area **20-25 minutes** prior to the fall]; *Calcango v Big V Supermarkets, Inc.*, 245 AD2d 698, 699 [3d Dept 2007] [finding no constructive notice where the plaintiff contended the spill was on the floor for **at least 20 minutes** before she slipped in fell because she was in the aisle that whole time]; *Woltner v Weiss*, 277 AD2d 804, 805 [3d Dept 2000] [dismissing the complaint where staff swept and mopped the area where the plaintiff fell approximately **30 to 40 minutes** prior to the fall]; *Forester v Golub Corp.*, 267 AD2d 526, 526 [3d Dept 1999] [finding no constructive notice where the assistant manager inspected the area where the plaintiff fell **30 to 40 minutes** before the accident and did not observe any water on the floor]; *Van Winkle v Price Chopper Operating Co. Inc.*, 239 AD2d 692, 693 [3d Dept 1997] [finding no constructive notice where the assistant manager had cleaned the floor in the area where the plaintiff fell only **35 to 40 minutes** prior to the accident]).

Moreover, "even assuming that water was present on the [] flooring at issue, 'the mere fact that a floor or walkway becomes slippery when wet does not establish a dangerous condition'" (*Van Duser v Mount Saint Mary College*, 176 AD3d 1532, 1534 [3d Dept 2019] [affirming dismissal of the complaint on wet flooring by Supreme Court, Ulster County, Fisher, J., 2018], quoting *Todt v Schroon Riv. Campsite*, 281 AD2d 783, 783 [3d Dept 2001]; *see Wessels v Service Mdse.*, 187 AD2d 837, 837 [3d Dept 1992] ["the mere fact that the sidewalk was wet was not

sufficient to establish a dangerous condition"]; *Bacon v Altamont Farms, Inc.*, 33 AD2d 708, 709 [3d Dept 1969] *affd* 27 NY2d 936 [1970] ["the mere fact that the walk was wet was not sufficient to establish a dangerous condition and something more than a slippery walk was required to be shown to enable plaintiffs to recover"] [internal citations omitted]; *see also Cavorti v Winston*, 307 AD2d 1018, 1019 [2d Dept 2003] ["It is well settled that the mere fact that an outdoor walkway becomes wet from rainfall is insufficient to establish the existence of a dangerous condition"]; *McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434, 435 [1st Dept 2010] ["The complaint properly was dismissed because, as a matter of law, mere wetness on walking surfaces due to rain does not constitute a dangerous condition"].) Pertinently, "a wet floor-especially in a bathroom where one can expect some water to make its way out of the shower to the floor-is not enough, standing alone, to establish negligence" (*Jackson v State*, 51 AD3d 1251, 1253 [3d Dept 2008]; *see Seaman v State*, 45 AD3d 1126, 1127 [3d Dept 2007] [holding "[t]he presence of a normal amount of water would not establish a want of reasonable care, we will not disturb the trial court's finding that claimant did not establish liability based on the wet bathroom floor."]). Therefore, "absent competent evidence of a defect in the surface or some deviation from relevant industry standards, the mere fact that a plaintiff has fallen on a floor that is inherently smooth, and thus slippery, will impose no liability" (*Portanova v Trump Taj Mahal Assocs.*, 270 AD2d 757, 758 [3d Dept 2000]).

Here, Defendants met their moving burden by and through the deposition testimony of the parties, particularly Plaintiff and Mr. Taylor, that constructive notice was not met. But more important, Defendants' also established that there was no dangerous or defective condition on the ground. As this Court held in *Van Duser v Mount Saint Mary College* (Index No. 16-0854; Sup Ct, Ulster County 2018, Fisher, J.]), which was affirmed by the Appellate Division, Third Department (*supra*, 176 AD3d 1532 [3d Dept 2019]), the mere fact the ground is "wet and slick" does not give rise to a dangerous or defective condition (*see Todt*, *supra*, 182 AD2d at 783 ["the mere fact that a floor or walkway becomes slippery when wet does not establish a dangerous condition."]). In addition, like this case, the plaintiff in *Van Duser* argued that the defendants should have used mats and that the defendants did use mats in one area but not in the area where the plaintiff fell. However, as this Court found and was affirmed, the argument of mats was speculative as an aegis to protecting the plaintiff from falling. This was rebutted by Defendants, who also demonstrated by the through their expert that the tile used on the flooring had a

coefficient of friction when wet that was *higher* than what the relevant ANSI and ASTM Standards required. As such, the Court is satisfied both that Defendants have demonstrated there is no dangerous or defective condition and that they did not have constructive notice.

Once the movant has made such a showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. (*See Zuckerman*, 49 NY2d at 562 ["mere conclusions, expressions of hope or unsubstantiated allegations or asserts are insufficient."].) "[I]n deciding a motion for summary judgment, the trial court must view all evidence in the light most favorable to the party against whom such judgment is sought and, where there is any doubt as to the existence of a triable issue of fact, it should deny the motion since the goal is issue finding rather than issue determination" (*Swartout v Consolidated Rail Corp.*, 294 AD2d 785, 786 [3d Dept 2002] [citations omitted]; *see also Oritz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]; *Greco v Boyce*, 262 AD2d 734, 734 [3d Dept 1999] [holding courts are "to view the evidence in light most favorable to the nonmoving party, affording that party the benefit of all reasonable inferences, and to ascertain whether a material, triable issue of fact exists."]).

Here, Plaintiff has failed to raise a question of fact or credibility. First, the entire spoliation argument is a red herring in defense of this motion. It was not an argument developed prior to the close of disclosure and appears made to attempt to escape liability. Second, Plaintiff's cross-motion and opposition neglected to argue as to the dangerous nature—or lack thereof—of the wet condition on the floor. Plaintiff's own deposition testimony indicated that he was unsure that he stepped in the puddle that caused him to fall, as he "would assume" that he did but he did not know if he did; this was, of course, manipulated in the affidavit in opposition that he did slip in the puddle. But nowhere in Plaintiff's cross-motion or opposition did he adequately establish that the floor was a dangerous condition more than a condition that was slippery when wet. His deposition testimony even was that the ground was generally "mostly all wet," which further underscores that he was indeed in a bathroom shower where the floor gets wet. Without anything more, this is insufficient to impose liability. (*See Van Duser*, 176 AD3d at 1534; *accord Todt*, *supra*, 182 AD2d at 783; *Wessels*, *supra*, 187 AD2d at 837; *Bacon*, *supra*, 33 AD2d at 709 [3d Dept 1969] [requiring something more than the walkway was wet and slippery]; *Jackson*, *supra*, 51 AD3d at 1253; *Seaman*, 45 AD3d at 1127.)

Moreover, Plaintiff was without competent evidence of the alleged defect or a deviation of the relevant industry standards to establish anything more than the bathroom floor was slippery when wet. (*See Portanova, supra*, 270 AD2d at 758.) Plaintiff's expert did not test or have any rebuttal to the coefficient of friction other than offering blanket statements that the tile was not tested—which it was. Plaintiff's expert also opined that there was a defective slope of the bathroom floor, which he conjured from looking at three grainy cell phone photographs of the floor, as he did not make a site visit. The alleged deviation was 2%, which it is impossible to know how he derived this percentage from looking at the same photographs the Court did. Moreover, as Defendants' indicated in their reply papers, Plaintiff's expert cited to the wrong section of code that was inapplicable—and the Court agrees. Plaintiff's expert response, report, and affidavit in opposition is not competent.

Furthermore, as alleged in Defendants' reply, even if Defendants concede to Plaintiff's timeframe that he slipped and fell before the 9:00 p.m. walkthrough, according to Defendants' employees this would mean the last walkthrough ended around 8:30 p.m. This is uncontroverted. Viewing the facts in a light most favorable to Plaintiff, affording that him the benefit of all reasonable inferences, the Court cannot say that 30-45 minutes or less was a sufficient time to demonstrate constructive notice on Defendants.

In searching the record, the Court finds no grounds to impose liability on Defendants. While the Court acknowledges the argument by Plaintiff regarding spoliation, same would not rise to the level of striking the answer. Nor would the evidence alleged to have been provided been dispositive. This is a slip and fall, the ultimate issue is first whether the condition itself was dangerous, defective, or otherwise hazardous. Plaintiff utterly failed to demonstrate water on the bathroom floor by a shower stall was a dangerous or defective condition, or that Defendants had constructive notice of same. The Court never gets to spoliation without a dangerous condition.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that Defendants' motion for summary judgment is **GRANTED**, and the complaint asserted against Defendants is **DISMISSED**, and all claims asserted therein are **DENIED**; and it is further

ORDERED that Plaintiff's cross-motion is **DENIED**, and all other relief requested therein is denied in its entirety; and it is further

ORDERED that all other relief not discussed above is **DENIED**; and it is further

ORDERED that the trial scheduled in this matter is **ADJOURNED**, without date.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision and Order is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: August 31, 2020
Catskill, New York

ENTER:

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered all from NYSCEF:
Motion Sequence 001: #31 through #68, including notice of motion, supporting attorney affidavit, supporting affidavit of Taylor, supporting affidavit of Buell, and all exhibits therein, memorandum of law, and
Motion Sequence 002: #4 through #30, including notice of cross motion, supporting attorney affirmation, supporting affidavit of Plaintiff, and all exhibits therein, memorandum of law; defendant's affidavit in opposition and in further support, affidavit of Milian, and all exhibits therein, memorandum of law; and Plaintiff affirmation in reply and in further support, with all exhibits therein.