Brenowitz v Commerce Bancorp., Inc.

2009 NY Slip Op 31007(U)

May 1, 2009

Supreme Court, New York County

Docket Number: 102630/07

Judge: Judith J. Gische

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[* 1]
SCANNED ON 5/6/2009

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE   PART 10

Index Number : 102630/2007
BRENOWITZ, ILONA
vs.
COMMERCE BANCORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
MAY 06 2009
COUNTY CLERK'S OFFICE NEW YORK

Dated: May 1, 2009

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

--x

Ilona Brenowitz,
Plaintiff (s),

-against-

Commerce Bancorp., Inc., *individually* and d/b/a Commerce Bank, and Fieldstone Capital, Inc.,
Defendant (s).

--x

DECISION/ORDER
Index No.: 102630/07
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED
MAY 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' CBI and FCI n/m (3212) w/ HLC affirm, exhs	1
Pltf's opp w/SRH affirm, exhs (incl WM affid)	2
Defs' CBI and FCI reply w/HLC affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action. Issue has been joined and plaintiff filed the Note of Issue was filed August 25, 2008. The defendants now move for summary judgment dismissing plaintiff's claims against them. Since this motion was brought timely, it will be decided on the merits. CPLR § 3212 (a); Brill v. City of New York, 2 NY3d 648 (2004). The court's decision and order is as follows:

Arguments Presented

Plaintiff claims that she sustained personal injuries, including a fractured wrist, when she slipped and fell while she was using the Commerce Bank branch located at 2 Wall Street in downtown Manhattan ("the bank"). The bank is a commercial tenant of

defendant Fieldstone Capital, Inc. The defendants are jointly represented.[1]

Plaintiff was deposed by the defendants. She testified at her deposition ("EBT") that on December 1, 2006 ("date of the accident"), when she went to use the "Penny Arcade" at the bank, she slipped and fell. The Penny Arcade is located in the main lobby, a few feet beyond the check writing station, which is located to the left of the entrance. The main entrance is preceded by a carpeted ATM vestibule area. Plaintiff testified that she had cleared the carpeted area and was entering the main lobby, heading towards the Penny Arcade when she fell. After she fell, a female employee of the bank rushed over to see if plaintiff was hurt. This person turned out to be Erin Singer, the Assistant Branch Manager. Plaintiff refused medical attention, although bruised, and she told the woman that the "floor was wet." EBT p. 24.

According to plaintiff, it had been raining that day. She remembers seeing people on line in the bank holding umbrellas. Although the ATM vestibule is carpeted, the main lobby floor is made of marble. Plaintiff's expert (William Marletta, Ph.D) inspected and tested the floor in the main lobby. Dr. Marletta is a safety consultant with a Ph.D in occupational safety and health. He opines that bank's polished marble floor is "unusually slippery and dangerous when wet." According to his testing, the slip resistance of the bank floor is only .25 but the accepted industry safe practice is that a floor should have a coefficient of friction greater than .5. He also opines that the floor's surface is non-compliant with the N.Y.C. Building Code requirement mandating that interior walkways that are not slip resistant be kept dry during periods of use.

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[1]The court notes, however, that each defendant separately answered and asserted cross claims against each other (Exh "B").

Defendants produced and plaintiff deposed Singer and its branch manager, Megan McKenna ("McKenna"). According to Singer, there are mats inside the main lobby near the entrance and usually one near the check writing platform, near the Penny Arcade. On the day of the accident, there was no mat near the check writing platform or the Penny Arcade. Although the bank does not provide customers with plastic bags for their wet umbrellas, the "greeter" near the entrance to the main lobby asks customers to place their wet umbrellas into one of two umbrella stands in the main lobby. According to Singer, this policy was implemented so that "if it has been raining outside the umbrellas don't drag water onto the marble floors." Singer EBT p. 27. The bank, according to Singer, also keeps a mop in an unlocked porter room in case of spills, water, etc. Any bank employee can use the mop, if needed and Singer has done so herself on prior occasions when she has noticed water. Singer did not personally inspect or survey the lobby floor that day to see if it was wet and she did not notice any water. Singer had, on occasions prior to the date of the accident, observed water in the area where plaintiff fell, after it had rained or snowed.

After the accident, Singer completed an incident report. She also notified McKenna, the branch manager. The report identifies the weather condition as "rainy." Her response to a question on the questionnaire about whether the "weather was a factor in the incident?" is "yes."

McKenna took Polaroid snapshots of the accident scene; she also completed her own witness statement/report. She handed out blank forms to customers who had witnessed the accident for them to fill out. When asked at her EBT whether there was water in the area where plaintiff fell, McKenna answered: "Yes." In her report,

McKenna states that "the [mats] were down (three in total) upon entering the bank" and "we encourage everyone to wipe their feet when entering." McKenna was also deposed Like Singer, she testified the greeter asks customers to put their umbrellas into the available umbrella stands, and there is a porter stationed by the Broadway entrance. His job is to dry any wet spots anywhere in the bank. McKenna also testified that the bank usually puts down another mat near the check writing platform, but here was no mat in that area on the day of the accident.

Job Keenan is employed by non-party George Comfort & Son, a real estate company that performs work at the building for the landlord. He that he maintains the cooling and heating system for 2 Wall Street. He also supervises "a small cleaning staff for the building." EBT p.9. Keenan testified, however, that this staff bore no responsibility for mopping or cleaning the floors at 2 Wall Street or in the bank on the date of the accident.

Defendants contends they are entitled to summary judgment because they had a well established practice of dealing with water on rainy days which could not have been any more efficient than it was. Thus, they made "reasonable efforts" to keep the premises safe for people entering and walking through the bank. Defendants contend further that the dangerous condition was not visible or apparent because plaintiff herself did not notice (nor complain of) any water until she fell, and she could remember if her clothes got wet on impact. According to defendants, the dangerous condition did not exist for a long enough period of time for them to take remedial action either. The defendants argue further that there are not obligated to put down mats or mop incessantly, based on relevant legal precedent provides, and also because there was a

"storm in progress," making it impossible for them to keep up with the water customers were tracking in.

Plaintiff opposes defendants' motion on several basis. She argues that she demanded surveillance footage which was never turned over because it was spoliated. She seeks a missing evidence charge at trial against the defendants. Defendants, however, have come forward with proof they provided her with the sworn affidavit of Christopher Grosso, who administers personal injury claims against the bank. According to his affidavit, bank tapes are routinely erased after 120 days, unless there is a request for the tape. The tape was destroyed in April 2007 and the preliminary conference order ordering the tape produced is dated September 10, 2007. Grosso's affidavit is dated November 9, 2007.

Plaintiff argues that defendants had constructive (if not actual) notice of a dangerous condition on the day of her accident, i.e. that water on the polished marble floor would cause someone to slip and fall. She contends this is so because the bank had a porter on standby near the door when it rains and the greeter is instructed to ask customers when it rains to put umbrellas into the umbrella stands so as not to drip water in the bank.

Alternatively, plaintiff argues the created the dangerous condition by putting the umbrella stands on the marble floor and encouraging customers to walk over with dripping umbrellas. Plaintiff also contends that the bank had constructive notice of water puddling near the check writing platform because that is where customers usually stand with wet umbrellas as they complete forms for the tellers.

Discussion

burden shifts to her) raise a triable issue of fact as to whether defendants created the condition or had actual or constructive notice of it. Dombrower v. Maharia Realty Corp., 296 A.D.2d 353 (1st Dep't 2002).

Defendants allege there was an ongoing "storm," and this is a complete defense to plaintiff's claims. Where there is a "storm in progress" a defendant's duty to remedy the dangerous condition alleged is, in fact, suspended until after the storm ended (Espinell v. Dickson, 57 A.D.3d 252, 253 [1st Dept 2008] (*citing* Pippo v. City of New York, 43 A.D.3d 303, 304 [1st Dept 2007]). This is because the forces of nature are such that it renders it impossible for the defendant to keep up with the amount of snow, slush etc., being tracked into the premises. Here, while there is evidence that it was a rainy day, defendants have not provided any evidence that there was a "storm" in progress; it was just raining. Thus, the "storm in progress" defense is not applicable to the circumstances of this case and not a basis to grant defendants' motion for summary judgment. *Compare:* Solazzo, Jr., et al. v. New York City Transit Authority, 21 AD3d 735 (1st Dept 2005).

Defendants argue that the absence of a mat in the general vicinity where plaintiff fell is not evidence of negligence, and plaintiff is not entitled to an inference of negligence, but a "red herring." This is consistent with the case law in this department. In general, a defendant in control of premises (e.g. landlord etc.) is not obligated to put down rubber mats when it rains and the failure to do so is not evidence of negligence (Solazzo, Jr., et al. v. New York City Transit Authority, *supra)* nor are the defendants under any legal obligation to "continuously" mop up moisture tracked into the premises from outside precipitation (Keum Choi v. Olympia & York Water Street Co., 278 A.D.2d

106 [1st Dep't 2000]; Dubensky et al. v. 290 Westchester Co., LLC et al., 27 AD3d 514 [2nd Dep't 2006]). Thus, plaintiff's argument that defendants had constructive notice of a dangerous condition for this reason (not having mats) does not raise issues of fact for trial.

The court has also plaintiff's related argument that the bank either created or had constructive knowledge of a dangerous condition because it failed place a mat at the check writing platform or other places where there were recurring problems with water accumulating when it rained. According to plaintiff, customers lingered in that area while completing forms for the teller, and therefore, it was foreseeable that dripping umbrellas could/would cause water to puddle in that area. Plaintiff, however, does not know where the water she slipped on came from, i.e. whether it had been tracked into the bank by someone walking in immediately before her, but not stopping at that platform. *see* Gibbs v. Port Authority, 17 AD3d 252 (1st Dep't 2005). A general awareness of a dangerous condition is an insufficient basis to impose liability in a negligence action involving this kind of accident. Keum Choi v. Olympia & York Water Street Co., *supra*. Since there is no evidence to permit a finder of fact to infer, without speculating, that defendants had constructive notice of a dangerous condition, plaintiff's argument fails to raise triable issues of fact that would defeat defendants' motion. Dombrower v. Maharia Realty Corp., 296 A.D.2d 353 (1 Dep't 2002) (*internal citations omitted*). Although it may have been raining that day, and the bank did not place a mat in the proximate area where plaintiff fell, this does not amount to "an inference of constructive notice." Joseph v. Chase Manhattan Bank, 277 A.D.2d 96 (1st Dept 2000).

Plaintiff seeks to raise triable issues of fact through her expert. He opines that

the bank should have had mats down because it was raining and the absence of mats was the proximate cause of plaintiff's accident. Dr. Marletta also observes that the bank lets customers use the bank, even if he or she "refuses to wipe their feet." Although professing to be a safety specialist, Dr. Marletta does not explain how this is a departure from safe practice for the bank, or how other banks handle this problem differently. His opinion, that the bank must place down mats, is contrary to the applicable legal precedents in this department. Defendants are under no legal obligation to either place mats or continuously mop the floor, and the failure to do either is not evidence of, nor does it allow an inference of, negligence. Keum Choi v. Olympia & York Water Street Co., supra.; Dubensky et al. v. 290 Westchester Co., LLC et al., supra.

Dr. Marletta contends that plaintiff's fall was caused by water residue that was on someone's shoes, but does not address whether this could have come from plaintiff's own shoes. He also opines that the bank should have placed cautionary signs in the bank's main lobby [American National Standard A1264.2-2001] to divert customers away from any wet area. There is, however, no evidence that anyone observed or complained of water in the proximate area of plaintiff's accident before she fell, or that it existed for a sufficient period of time prior to the accident to permit the erection of a sign. While Dr. Marletta also opines the bank did not "adequately" mop the area, this observation is offered without any factual basis.

Dr. Marletta tested the bank floor and concluded that "this floor's surface is unusually slippery and dangerous" when wet and that floors made of marble have to be kept dry with adequate mopping and cleanup. As addressed elsewhere in this decision,

defendants are under no obligation to cover all its floors with rubber mats or continuously mop up moisture/ rain tracked in by persons walking through the bank. Furthermore, the implication is that because a marble floor is more slippery than any other floor when wet, defendant has a heightened duty to plaintiff or a different standard of care. This conclusion is not legally supported.

Although plaintiff offers Dr. Marletta's affidavit to defeat defendants' motion, it does not contain sufficient allegations to demonstrate that the conclusions it contains are more than speculation and that it would, if offered alone at trial, support a verdict in plaintiff's favor. Ramos v. Howard Industries, Inc., 10 N.Y.3d 218, 224 (2008) (internal citations omitted).

Defendants have also proved that the landlord was not responsible for mopping or cleaning the floors inside the bank, nor did the accident occur at the other entrance to the bank which is through the lobby of the building. Plaintiff has not raised issues of fact, that Fieldstone created the dangerous condition, or had constructive notice of it.

Defendants have met their burden on this motion for summary judgment. They have proved they did not create, nor have actual or constructive notice of the hazardous condition alleged. Pappalardo v. Health & Racquet Club, 279 AD2d 134 (1st Dep't 2000). Defendants have also proved that there is no evidence the dangerous condition was visible or apparent, or that it existed for a sufficient length of time prior to the accident for them to have discovered the defect and remedied it. Gibbs v. Port Authority of New York, supra.; Gordon v. American Museum of Natural History, supra.; Tarrabocchia v. 245 Park Avenue Co., 285 A.D.2d 388 (1st Dep't 2001); Pappalardo v. Health and Racquet Club, *supra*. Defendants have also proved they made "reasonable

efforts" to keep the premises safe, under the existing circumstances. *See* Perez v. Bronx Park South, 285 AD2d 402 (1st Dep't 2001). The bank's "greeter" encouraged customers to put their wet umbrellas into stands available for that purpose and there was a porter who was instructed to mop any water he saw or was brought to his attention.

Plaintiff did not complain about water on the floor before she fell and she does not know whether the water came from her own shoes or some other source. Plaintiff has not come forward with triable issues of fact. Although she claims there was a dangerous condition in the area where she fell, at best, she has only set forth facts tending to show defendants had a "general awareness" rain water *might* accumulate in certain areas of the bank when it rained and customers used their facilities. This is an insufficient basis to impose liability in a negligence action involving this kind of accident. Keum Choi v. Olympia & York Water Street Co., *supra*.

The court has also considered the merits of plaintiff's claim, that certain surveillance tapes were destroyed by the bank and she thinks this is because they were helpful to her. Plaintiff has not come forward with any evidence that the defendants either intentionally or negligently destroyed the tapes. Kirkland v. New York City Housing Authority et al., 236 AD2d 170 (1st Dep't 1997); Squitieri v. City of New York, 248 AD2d 201 (1st Dep't 1998); Marro v. St. Vincent's Hospital et al., 294 AD2d 341 (2nd Dep't 2002). Defendants have provided a reasonable explanation for why the tapes were erased and they are under no duty to keep them. Plaintiff filed her note of issue indicating discovery was complete. The absence of the tapes is not a reason to deny defendants' motion. Given the factual circumstances of this accident - as plaintiff

alleges them to be - the tapes would not have been helpful to her in defeating this motion.

Conclusion

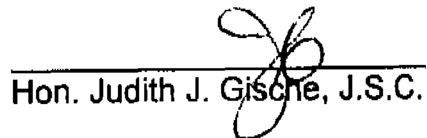
For each and every one of the foregoing reasons, defendants' motion for summary judgment must be, and hereby is, granted and the complaint dismissed. The Clerk shall enter judgment in favor of defendants, against the plaintiff .

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 1, 2009

So Ordered:



Hon. Judith J. Gische, J.S.C.

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