

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN
Justice

IAS PART 6

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CAROL ADAMS,

Index No.: 8776/05

Plaintiff,

Motion Date: 1/15/08

-against-

Motion Cal. No.: 1 & 2

WEST HARLEM GROUP ASSISTANCE,
INC.,

Motion Sequence No.: 1 & 2

Defendant.

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WEST HARLEM GROUP ASSISTANCE,
INC.,

Third-Party Plaintiff,

-against-

TRUSTEE OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK,

Third-Party Defendant.

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The following papers numbered 1 to 13 read on these motions by defendant/third-party plaintiff, and third-party defendant seeking summary judgment dismissing the plaintiff's complaint, and plaintiff's cross motion to compel discovery.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	1-3
Reply Affirmation.....	4
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The defendant/third-party plaintiff, WEST HARLEM GROUP ASSISTANCE, INC. (hereinafter referred to as “WEST HARLEM”) seek an Order granting summary judgment and dismissing the plaintiff’s complaint. Plaintiff opposed and WEST HARLEM replied.

The third-party defendant, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK (hereinafter referred to as “COLUMBIA”), seek an Order granting summary judgment dismissing the plaintiff’s complaint and/or the third-party complaint. Plaintiff opposed and COLUMBIA replied.

The underlying action is one sounding in negligence wherein the plaintiff commenced an action to recover for injuries allegedly sustained on July 28, 2004 when she slipped and fell. Specifically, plaintiff, while employed by third-party defendant, COLUMBIA, and during the course of said employment, slipped and fell in the kitchen area of the building located at 127 West 127th Street, which was managed by defendant, WEST HARLEM. Plaintiff commenced this action against WEST HARLEM for negligence. Subsequent thereto, defendant/third-party plaintiff, WEST HARLEM, commenced a third party action against COLUMBIA seeking contractual indemnification.

Plaintiff testified at her deposition that as an employee of COLUMBIA, she was responsible to oversee the clients who cooked breakfast in the kitchen area each morning.¹ That on the morning of July 28, 2004, she went into said kitchen and was caused to fall due to a greasy substance on the floor.

The Court notes that from the testimony of plaintiff, WEST HARLEM and COLUMBIA, as well as third party statements, it is undisputed that a client, Spencer Brown, was cooking breakfast on the morning of July 28th 2004, and that after cooking salmon cakes, he removed the grill plate for cleaning. As he removed said grill plate, some of the greasy liquid spilled on the floor. Mr. Brown cleaned up said spill, and shortly thereafter plaintiff came into the kitchen, slipped and fell.

Plaintiff testified that she did not notice if the floor was discolored prior to her fall. Plaintiff avowed that as she started slipping, she asked a client by the name of Linda Brooks what was on the floor and Ms. Brooks informed her that Mr. Brown spilled grease and was in the process of cleaning it up. Up to this point, plaintiff’s testimony is corroborated by the testimony and documentary evidence presented herein.

Plaintiff, however, contradicted her own testimony. Later in the same deposition, when questioned how the grease was spilled, plaintiff testified that there is a griddle and the grease drops into a tray that leaks. When further questioned who told her the grease tray leaked, plaintiff replied that she knew because sometimes she cooked in that kitchen. However, plaintiff did not inform anyone that the stove and/or the grease tray leaked. Plaintiff admitted that prior to

¹COLUMBIA runs a community support system for psychiatric outpatients, whose primary mission is to prevent recidivism of psychiatric hospitalizations. Plaintiff was employed as a case manager and was responsible to oversee the safety and welfare of the clients assigned to her.

her fall she knew the floor could be slippery, and that she notified the officer manager of COLUMBIA that the floor was slippery in 1999 - 2000, some four years prior to her accident.

In support of plaintiff's theory that the stove leaked grease, plaintiff annexed certain invoices concerning repairs made to the stove. However, said invoices do not bear the weight of reliance that plaintiff places on them. In particular, the invoices submitted by plaintiff refer to the replacement of an "infinite switch" one month prior to the incident, and an estimate stating that the thermostat and burner switches need to be rewired one year after the incident. There is no evidence of any repairs to correct a defect to the grease tray, nor indeed any allegation or complaint of same.

Further, plaintiff attempts to prove notice of the alleged grease tray leak by annexing correspondence between WEST HARLEM and COLUMBIA concerning the stove. One year prior to the incident herein, COLUMBIA informed WEST HARLEM, that pursuant to an audit by the Department of Health, they were cited for several deficiencies, one being the dirty condition of the stove. WEST HARLEM responded and had the stove area cleaned. Accordingly, the documentary evidence put forth by plaintiff does not establish the existence of a grease tray leak, and does not corroborate plaintiff's testimony.

Plaintiff's allegation that the stove leaked grease was controverted on numerous occasions. A deposition of Willie Prescott, the program director of COLUMBIA was held. As program director, he was the plaintiff's supervisor. Mr. Prescott testified that he never received any complaint from plaintiff regarding any leaks. In fact, Mr. Prescott testified that he never received any complaint, from anyone, that the stove leaked grease. Furthermore, Mr. Prescott's testimony indicated that he never received any complaints that the stove leaked grease from Mr. Brown and Ms. Brooks, who are the two clients who cooked on a daily basis. Additionally, Mr. Prescott averred that he himself has cooked on said stove and never observed it leak grease.

June Andrews testified on behalf of WEST HARLEM. Ms. Andrews is the Chief operating officer of WEST HARLEM. Ms. Andrews testified that the only complaints received concerning the subject stove was that the burners weren't working. When questioned if she ever received any complaints, from anyone, that the stove leaked grease, she testified in the negative.

A deposition of Eddy Bardowell, the Director of Building Services for WEST HARLEM, revealed that prior to July 28, 2004, he never received any complaints that the stove leaked grease. Mr. Bardowell testified that none of his staff, nor Mr. Prescott, reported any problems of the stove leaking grease and spilling onto the floor.

The standard of summary judgment requires the proponent to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form. (Santanastasio v. Doe, 301 AD2d 511, 753 NYS2d 122 [2nd Dept. 2003]). Further, when reviewing a defendant's motion for summary judgment we are required to accept as true the allegations of the complaint. (Guggenheimer v. Ginzburg, 43 NY2d 268 [NY 1977]). The burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment. (Zuckerman v. City of New York, 49 NY2d 557 [NY 1980]).

It is well settled that the existence of a slippery substance on a floor does not, in and of itself, give rise to a cause of action sounding in negligence. (See, Lewis v. Metropolitan Transp. Auth., 99 AD2d 246). Plaintiff must establish that the slippery substance was present “under circumstances sufficient to charge the defendant with responsibility therefor; in other words, to prove either that defendant had knowledge of the alleged dangerous condition, either actual or constructive, or that it cause the condition to be created by its own affirmative act” (Lewis v. Metropolitan Transp. Auth., supra, at 250).

“To impose liability on a defendant for a slip and fall on an allegedly dangerous condition on a floor, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time”. (citation omitted) (Rodriguez v. Sixth President, Inc., 4 AD3d 406, 407, 771 NYS2d 368 [2nd Dept. 2004]).

There was no evidence presented that the defendant/third-party plaintiff, WEST HARLEM, created the dangerous condition, to wit: the grease spilled by a patient of COLUMBIA, and therefore, WEST HARLEM cannot be charged with having actual notice of said condition.

Similarly, there is no evidence that establishes that WEST HARLEM had constructive notice of said grease spill. It is well settled that constructive notice exists only where a defect is visible and apparent, and has been present for a sufficient length of time prior to the incident to enable defendant’s employees to discover and remedy the same. (See, Gordon v. American Museum of Natural History, 67 NY2d 836, 492 NE2d 774 [1986]).

Defendant, WEST HARLEM, has satisfied their burden by submitting evidence which demonstrated that they neither created the allegedly dangerous condition, nor had actual or constructive notice of the same. Accordingly, defendant has made a prima facie entitlement to a judgment as a matter of law dismissing plaintiff’s complaint herein.

The plaintiff has failed to present a triable issue of fact herein. Plaintiff’s own testimony confirms that defendant did not create the grease spill, nor had actual or constructive notice of said spill. Rather, plaintiff attempts to create an issue of fact in alleging that the stove leaked. Other than plaintiff’s own testimony, plaintiff has not presented a scintilla of evidence to substantiate this allegation. The Court notes that neither plaintiff’s Complaint, nor Verified Bill of Particulars, contain any allegation that the stove was defective and leaked grease.

“Judgment may be summarily granted where compelling documentary evidence clearly demonstrates that factual issues raised in opposition to the motion are not genuine, but feigned” (Alvarez v. New York City Housing Authority, 295 AD2d 225, 744 NYS2d 25 [1st Dept. 2002]). Where self-serving affidavits, submitted by a plaintiff in opposition to summary judgment motion, contradict the plaintiff’s own deposition testimony and appear to be tailored to buttress plaintiff’s arguments, they are insufficient to raise a triable issue of fact. (Phillips v. Bronx Lebanon Hosp., 268 AD2d 318, 701 NYS2d 403 [1st Dept. 2000]). Here, plaintiff submits self-serving testimony tailored to buttress her allegation that the stove leaked grease.

Accordingly, defendant, WEST HARLEM's motion for summary judgment is granted and plaintiff's complaint as and against WEST HARLEM is dismissed.

Inasmuch as plaintiff's complaint is hereby dismissed, third-party defendant, COLUMBIA's motion for summary judgment is also granted, and plaintiff's cross motion to compel discovery is moot.

A copy of this Order is being faxed to all parties herein.

Dated: April 23, 2008

LAWRENCE V. CULLEN, J.S.C.