

Decided on June 16, 2008

Supreme Court, Queens County

William Tummings, Plaintiff,
against
Home Depot, USA, Inc. & Laro Maintenance
Corporations, Defendants.

6077/06

Joseph P. Dorsa, J.

By notice of motion, defendant, Home Depot, USA, Inc. (Home Depot), seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal.

Co-defendant, Laro Maintenance Corporations (Laro), files a cross-motion for summary judgment and dismissal of the complaint and any and all cross-claims as to them.

Plaintiff files a separate affirmation in opposition to the motion and cross-motion. Home Depot files an affirmation in partial opposition to the cross-motion and Home Depot and Laro file replies to plaintiff's opposition.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a slip and fall accident at the Home Depot premises located at 132-30 Merrick Boulevard, in Queens, New York on October 5, 2004, at approximately 10:15 a.m.

Plaintiff alleges that he slipped and fell because of the presence of water on the floor in the hardware department of the [*2]store. The water, plaintiff maintains, was there because of the negligent manner in which the floors were being washed.

There is a sharp dispute between the parties regarding the representations made by plaintiff as

part of his deposition testimony, and what that testimony signifies.

Plaintiff testified that he arrived at the Home Depot in question around 9:30 a.m. on the date of his accident. He selected certain items, including some roofing paper and proceeded to the check out line when he remembered that he needed nails. He left the check out line to go back for the nails. While he was looking for nails he saw a Hispanic woman (transcript at 146) pushing an electric floor cleaner. When asked if the area where he saw the woman was toward the back of the store, he answered, "No. Same nail aisle, but the same area, the same area. Was the same dimension." (Transcript at 150).

He selected the nails he wanted and proceeded back to the main aisle and the check out line. He took about four steps into the main aisle and fell (transcript at 55). He couldn't describe the depth or size or shape of the water he saw on the floor (transcript at 67, 68). but it was wet, and clear water (transcript at 67, 68), and his legs, hand and pants were wet (transcript at 66 and 68).

Plaintiff does admit, however, that he never saw anyone using the cleaning machine in the main aisle where he fell (transcript at 75).

Defendant Home Depot's store manager, Obiesie Okoro, testified on behalf of defendant. He testified that the cleaning machine used by co-defendant Laro would wet the floor and then vacuum up the water to accomplish the floor cleaning (transcript at 28). Okoro testified that the maintenance, floor cleaning people from Laro would start around 6:00 a.m. and finish by 7:30 or 8:00 a.m., the latest (transcript at 30). He also testified that no one at Home Depot was responsible for supervising the Laro maintenance workers (transcript at 32).

Mr. Okoro didn't recall using caution signs when the floor was being cleaned, but he did allow customers to walk through the store while the floor cleaning was being conducted (transcript at 49, 50).

Okoro was working on the date of plaintiff's accident. When he learned of plaintiff's accident, he went to the scene where plaintiff was lying on the floor, at the end of the nail aisle [*3] where it intersected with the main aisle. He testified that he didn't recall seeing water on the floor at that location, and that he didn't recall making out an accident report, although when presented with a copy he admitted it was his handwriting on the report.

Defendant Home Depot emphasizes that plaintiff saw the person pushing the cleaning machine one time only, and then only towards the back of the store, some fifteen (15) to twenty (20) feet from where he was. Plaintiff never saw anyone with the cleaning machine in the main aisle (transcript at 153, 158).

Plaintiff did not see anything on the floor on his way to the nail aisle, (transcript at 61), and when he saw the water after he fell he couldn't describe it in size or shape (transcript at 67, 68), but did say it was clear (transcript at 67).

Mr. Okoro testified that the condition of the floor where plaintiff was lying was "clean."

(Transcript at 45, 46). He didn't see any water or moisture (transcript at 46). When asked if he walked past that area that day prior to the accident he answered: "I probably did" (transcript at 46); and regarding the condition of the floor he answered, "Nothing stood out of the ordinary." (Transcript at 46). When asked if he recalled how long it had been before the accident that he had walked by the "accident area" he answered "I don't know. It had to be maybe five to ten minutes," and again the condition of the floor was "nothing out of the ordinary" (transcript at 76).

Prior to the accident he had not received any complaints about the condition of the floor in that area (transcript at 76), but the area of the floor where the accident occurred was within the scope of the floor cleaning that Laro would normally do at that time (transcript at 77).

The assistant store manager, Ernest Rowe, testified at an examination before trial. He stated that he came to the area where plaintiff fell, after he fell and saw nothing, no wetness or moisture on the floor (transcript at 20, 21). He also stated he'd walked past that same area "maybe twenty times" before the accident, and didn't see any water or moisture then either (transcript at 20).

Robert Pandone, Regional Manager for Laro in their service agreement with Home Depot stores testified on behalf of Laro. Mr. Pandone testified that the "scrubbing" time for the Springfield Gardens store, where the accident occurred, was from 6:00 a.m. to 10:00 a.m. (transcript at 47). He described the [*4] areas where Laro was responsible for "scrubbing" the floors, and it included the hardware department where the accident happened (transcript at 29). Mr. Pandone described the two women, Laro employees, who worked at the Home Depot in question, at the time of the accident, who operated the floor scrubbing machines, as Hispanic, and in their 30's. He did not, however, know their names, although he was aware that they were still employed by Laro, working at the same store (transcript, 30-32). Counsel for plaintiff reserved his right to depose said Laro employees upon production of their names and addresses (transcript at 32). Plaintiff's subsequent request that said workers be produced for deposition was denied by Laro.

Finally, Mr. Pandone testified that Home Depot was not responsible for supplying or maintaining the floor scrubbing machine used at the store in question (transcript at 50). In fact, the floor scrubber was owned by Laro (transcript at 49), and Home Depot employees had no right to instruct the Laro cleaning crew on how to do their jobs (transcript at 50)

Attached to Home Depot's notice of motion, under Exhibit tab "R," is a response to a Preliminary Conference Order, which in turn has various attachments to it. One of the attachments, under Exhibit "B" is what is entitled "Maintenance Service Agreement" representing the contract for services between Home Depot and Laro. The Maintenance Service Agreement, once again, in turn, has attached to it Exhibit "A," "The Home Depot Northeast Division Maintenance Policies Revision, No.6, dated May 1, 1997," which once again, and finally has as attached to it, as Exhibit "B," a work list. This list is described by Home Depot as being part of their contract or service agreement with vendors.

This last attachment is a listing of "Outsource Provider" responsibilities, and "store" responsibilities. On the very last page of this attachment it is written: "NOTE: LARO'S PORTER WILL BE UNDER DIRECT CONTROL OF THE STORE MANAGER/BUILDING

MANAGER," all in "caps."

Moreover, in the same *Maintenance Policies Revision #*

6, dated May 1, 1997, which is attached to the Service Agreement between Home Depot and Laro, paragraph number six provides, in pertinent part, that the store manager, upon completion of their (Laro's) work, will approve their work and sign them out.

And finally, the first daily listing for the "Outsource Provider" responsibilities, noted above, is: "1) Full sweep floor, scrub main isles of store and one seventh of remainder of sales floor (*Home Depot to supply and maintain Floor Scrubber*)" [*emphasis [*5] added, in bold in original*].

"A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Miguel v. SJS Assoc., LLC*, 40 AD3d 942 (2007); *Rodriguez v. White Plains Pub. Schools*, 35 AD3d 705; *Perlongo v. Park City 3 & 4 Apts., Inc.*, 31 AD3d 409 (2006))." *Van Dina v. St. Francis Hosp., Roslyn, NY*, 45 AD3d 673 , 674, 845 NYS2d 430 (2007).

In *Dugan v. Crown Broadway, LLC*, 33 AD3d 656 , 657, 821 NYS2d 896 (2d Dep't 2006), the Court held that defendant (appellant's) "...evidentiary submissions were insufficient to make a prima facie showing that the cleaning procedures and products it utilized in performing its contractual duties did not create the alleged dangerous condition which caused the plaintiff to slip and fall (*see Petrocelli v. Marrelli Dev. Corp.*, 31 AD3d 623 (2006); *Avellino v. TrizecHahn Newport*, 5 AD3d 519 (2004))."

In *Dugan*, the defendant appellant was the same defendant Laro Services Systems, Inc., as in this instance, where defendant also argued they owed plaintiff no "...duty of care by virtue of its cleaning service contract with the defendant property owner." *Id.* at 656. The Court in *Dugan, supra* , recognized an exception to the general rule enunciated in *Espinal v. Melville Snow Constr.*, 98 NY2d 136, 138-139 (2002), that "...a party who enters into a contract to render services does not assume a duty of care to third parties outside the contract..., [except]...where a defendant who undertakes to render services negligently creates or exacerbates a dangerous condition" (citations omitted). *Id.* at 656.

In a brief in response to defendant appellant, plaintiff, respondent, described in her statement of facts that shortly after arriving at work that day she slipped and fell on a "clear slippery substance" on the ladies room floor. Plaintiff offered two other non-party witnesses to testify regarding the presence of such a substance, but offered no witnesses who could state that they actually saw defendant Laro Services Systems placing, putting or using the alleged slippery substance on the ladies room floor. 2005 WL 4910215 (NYAD 2d Dep't) (Appellate Brief).

The building superintendent then directed the Laro supervisor to direct someone to clean it up. *Id.*

At the trial court level defendant Laro argued their workers had [*6]no notice of the alleged dangerous condition, but proffered no testimony from the bathroom matron "Sonia," or work logs in support of said claim. *Id.*

On appeal, the defendant appellant Laro raised the issue of a lack of a duty of care for the first time, which the Appellate Division, nevertheless considered because it presented a question of law. *Dugan, supra* at 656. As noted above, the Court rejected defendant appellant's argument, because defendant failed to present sufficient evidence establishing that they had not created the condition. *Id.*

In *Van Dina v. St. Francis Hospital, Roslyn, NY*, 45 AD3d 673 , 674, 845 NYS2d 430 (2d Dep't 2007), plaintiff was "...allegedly...injured when he slipped and fell on a wet substance that covered the floor of the bathroom adjacent to his hospital bed in the defendant's emergency room."

In *Van Dina, supra* , defendant respondent argues in their appellate brief that the trial court was correct in granting summary judgment and dismissal to defendant. Defendant emphasized that plaintiff did not see anyone mopping the bathroom floor, was unaware of any conversations concerning work being done in the bathroom, and simply claimed he slipped because the floor was wet. (2007 WL 4703310, NYAD 2d Dep't. Appellant- Respondent Brief). Moreover, defendant argued "it is important to note that plaintiff did not know what caused what he described as a "sheen" on the bathroom floor. *Id.*

Nevertheless, the court found that "[t]he defendant failed to satisfy its initial burden of submitting evidence sufficient to refute injured plaintiff's deposition testimony, which gave rise to a reasonable inference that the defendant had created a dangerous condition on the bathroom floor by mopping (*see Dugan v. Crown Broadway, LLC*, 33 AD3d 656 (2006); *Avellino v. TrizecHahn Newport*, 5 AD3d 519 , 520 (2004); *Stone v. KFC of Middletown*, 5 AD3d 106 (2004); *Weingrad v. Aguilar Gardens*, 227 AD2d 546 (1996))." *Van Dina, supra* at 674.

In this instance, the testimony established that one of Laro's employees, a Hispanic woman, whom defendant Laro later identified as Sonia Rivera, was using a floor scrubber in the general area or "dimension" of where he fell. The testimony established, through defendant Laro's witness, Robert Pandone, that the floor scrubbing was to be conducted between the hours of 6:00 a.m. to 10:00 a.m. Plaintiff entered the store at approximately 9:30 a.m., and the accident occurred at approximately 10:00 a.m.

Moreover, testimony established that the operation of the floor scrubber was to place water on the floor, and then vacuum it up. Plaintiff testified that when he fell there was water on the floor that wound up on his leg, his hand and his pants.

Defendant Home Depot argues that plaintiff fails to establish that they had notice, actual or constructive of the alleged wet condition on the floor and therefore must be granted summary [*7]judgment. Defendant's reliance on this theory and the cases in support thereof, however, is misplaced (i.e. *Young v. XYZ Corp.*, 245 AD2d 503, 504, 666 NYS2d 708 (2d Dep't 1997);

Fontana v. Fortunoff, 246 AD2d 626, 668 NYS2d 394 (2d Dep't 1998).

Where, as here, the claim by plaintiff is that defendant Home Depot and/or co-defendant Laro, defendant Home Depot's agents, created the dangerous condition, that is the water on the floor, notice, actual or constructive is not an issue. (See Pattern Jury Instruction, Civil, 2008, 2:91 *Comment* p. 571, para. 2, "Notice is not an element of the cause of action if defendant created the condition.")

The same is true, as noted previously, where defendant Laro maintains it owes no duty of care to injured third parties. (*See, Dugan v. Crown Broadway, LLC, supra*).

Accordingly, upon all of the foregoing, the motion and cross-motion are denied.

Dated: Jamaica, New York

June 16, 2008

JOSEPH P. DORSA

J.S.C.