SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Salaam Scarpulla Justice PART 19

Index Number : 101072/2011
SELEMAN, MICHAEL
vs.
BARNES & NOBLE, INC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

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

Dated: 2/11/13

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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MICHAEL SELEMAN,

Plaintiff,

Index No.: 101072/11
Submission Date: 11/14/12

- against-

BARNES & NOBLE, INC.,

DECISION AND ORDER

Defendant.

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For Plaintiff:
Rosenberg, Minc, Falkoff & Wolff
122 East 42nd Street, Suite 3800
New York, NY 10168

For Defendant:
Leahey & Johnson, P.C.
120 Wall Street
New York, NY 10005

Papers considered in review of this motion for summary judgment:

Notice of Motion 1
Aff in Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Barnes & Noble, Inc. ("B&N") moves for summary judgment dismissing the complaint.

On November 4, 2010, plaintiff Michael Seleman ("Seleman") slipped and fell on the escalator located within the B&N bookstore at 150 East 86th Street. He claimed that he felt a wet condition on the escalator, which caused him to slip and fall. Seleman sustained injuries to his back. He commenced this action in or about January 2011, seeking to recover damages for the injuries he sustained.

B&N now moves for summary judgment dismissing the complaint, first arguing that no evidence has been presented to support Seleman's allegation that there existed any slippery/wet condition on the escalator that could have caused Seleman's fall.

In support of its argument, B&N submits the affidavit of store manager Joseph Allen ("Allen"), who provided that there was carpeting in the lobby area, and walk-off mats covering the tile floor leading from the carpeted area to the escalator. According to Allen, the mats were in place at the time of the accident.

B&N also submits the affidavit of professional engineer Mark Marpet ("Marpet"), who examined the subject escalator, and explained that,

> "given the design of the surface of the escalator steps, which have elevated lands spaced between lower grooves, it is impossible for liquid to pool or "build up" on the escalator as the plaintiff claims in his bill of particulars. Any liquid on the surface of the escalator steps will drop from the raised lands and enter the grooves between the lands and drain into the escalator interior. Additionally, there are 'combs' at the top and bottom of the moving stairs that will scrape off any foreign material that is sitting on the tread. Furthermore, the treads travel upside down when they are hidden from view, which drains any liquids from the top of the tread."

Marpet additionally opined that based on his analysis of the friction coefficient of the subject escalator treads, the surface of the treads was reasonably safe, irrespective of whether the escalator treads were wet or dry. He concluded that the escalator was not a "causative factor" in Seleman's fall.

B&N further argues that even if a dangerous condition did exist on the subject escalator, there is no evidence that B&N created or had notice of said condition. B&N

submits the testimony of the assistant manager at the subject store, Jacqueline Fantasia ("Fantasia"), who provided that the subject premises was inspected regularly and there were three overlapping shifts of maintenance crews who maintained and cleaned the subject premises. Fantasia also personally inspected the premises regularly and she was unaware of any prior accidents on the subject escalator or any prior complaints about slippery conditions on the subject escalator. B&N contends that no further evidence has been presented as to anyone with knowledge of a dangerous condition on the subject escalator or the length of time any such condition had existed prior to Seleman's fall.

In opposition, Seleman submits his own affidavit, in which he explains that his accident occurred at 9:15 p.m., when he fell on a wet and slippery condition on the subject escalator. He also submits the July 3, 2012 affidavit of Jennifer Comacho ("Comacho"), in which Comacho states that on the evening of November 4, 2010, at approximately 8:30 p.m., she observed a wet, slippery and unsafe condition on the subject escalator. She decided to take the stairs after noticing the condition on the escalator.

Seleman further maintains that B&N failed to meet its burden of proving lack of notice, because it did not submit evidence as to when the escalator was last inspected or maintained for safety purposes, or evidence as to the store's policy or program with regard to escalator inspections.

In reply, B&N maintains that (1) the affidavits submitted by Seleman and Comacho are self-serving and must be disregarded because according to the accident report,

Seleman's fall occurred at 6:00 p.m.; and (2) Seleman has submitted no evidence to refute B&N's expert testimony as to the safety of the escalator.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In order to subject a property owner to liability for a hazardous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury. *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499 (1st Dept. 2008). A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. *Giuffrida v. Metro North Commuter R.R. Co.*, 279 A.D.2d 403 (1st Dept. 2001).

Here, the court finds that B&N has fulfilled its burden of making a prima facie showing of entitlement to judgment as a matter of law. B&N submits evidence of the inspection and maintenance/cleaning protocol that was in place at the subject premises, evidence that B&N knew of no prior complaints or accidents on the subject escalator, as

well as expert testimony that no dangerous condition could have existed at the time of Seleman's fall.

In opposition, Seleman fails to raise any triable issues of fact. According to Seleman's affidavit, his fall occurred at 9:15 p.m., however, according to the accident report, which was completed at 9:53 p.m., the fall occurred at approximately 6:00 p.m. If, in fact, the accident did occur at 6:00 p.m., then Comacho's affidavit in which she states that she saw a wet condition on the escalator at 8:30 p.m. would be immaterial. In any event, Comacho was not listed on the accident report and Seleman provides no explanation as to how he discovered Comacho. In her affidavit, Comacho does not indicate that she told anyone about the alleged wet condition that she observed on the subject escalator at 8:30 p.m. on the night of Seleman's accident and therefore, her affidavit is insufficient to raise an issue of fact as to actual notice.

In addition, her affidavit is insufficient to raise an issue of fact as to constructive notice, specifically as to whether the alleged wet condition existed for a sufficient length of time prior to Seleman's accident to allow B&N to discover the condition and allow for time to remedy the condition. *See Penny v. Pembrook Mgmt., Inc.*, 280 A.D.2d 590 (2nd Dept. 2001). Comacho does not specify that the wetness that she observed on the subject escalator was in the same portion of the escalator as Seleman's fall; she claims that she observed wetness on the escalator merely 45 minutes prior to Seleman's fall; and there is

no further indication as to the length of time that the alleged wetness was present on the escalator prior to Seleman's fall.

Finally, Seleman fails to submit any expert testimony or other evidence sufficient to refute B&N's expert's finding that (1) based on the design of the subject escalator, any liquid present on the surface of the escalator treads would drain, and any foreign material on the surface of the treads would be scraped off; (2) based on a friction analysis, the surface of the escalator in question was reasonably safe, regardless of whether the escalator treads were wet or dry; and (3) the escalator did not cause Seleman to fall.

In accordance with the foregoing, it is hereby

ORDERED that defendants Barnes & Noble, Inc.'s motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

FILED

FEB 13 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York
February 11, 2013

ENTER:

J.S.C.