

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

AURELIA ROSS-ESTRILL,

Plaintiff,

v.

**SUNNY ISLE SHOPPING CENTER, INC.)
and JOHN DOE CORPORATIONS,**

Defendants.

CIVIL NO. 725/1997

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

NOT FOR PUBLICATION

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CABRET, P.J.

MEMORANDUM OPINION

(September 7, 2000)

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment, Motion for Protective Order and Sanctions. Plaintiff sued Defendant Sunny Isle ("Defendant") for injuries from a fall on its premises. Defendant moves for summary judgment, arguing that the complaint has not established it had notice of the condition that caused the fall, an essential element

of the claim. Additionally, Defendant challenges Plaintiff's reliance on an unauthenticated transcript in her opposition to summary judgment. Defendant further seeks sanctions against Plaintiff's counsel, claiming that submission of the videotape deposition constituted an impermissible response. For the reasons stated herein, Defendant's motions for summary judgment, protective order and sanctions are denied.

I. FACTS AND PROCEDURAL POSTURE

The Immigration and Naturalization Service ("INS") leased office space from Defendant in the Sunny Isle Shopping Center. Plaintiff, an INS employee, was injured when she slipped and fell in water on the floor of the ladies room. She brought an action in tort against Defendant. Sunny Isle seeks summary judgment on the issue of liability, contending it had no notice of the condition at the INS office on the day of the injury. While Defendant concedes it has a duty to repair under the terms of its lease with INS, it argues that such duty is conditioned on notice of any defects. Plaintiff opposed the motion for summary judgment, quoting from the deposition transcripts of several witnesses to bolster its argument that Defendant knew of the dangerous condition. One of the transcripts on which Plaintiff relied was that of a videotaped deposition of Ilma Petersen, an INS employee. The deposition was not contemporaneously transcribed; however, a transcript was subsequently prepared by a relative of Plaintiff's counsel. That transcript was never certified or authenticated. Defendant was present at the video deposition and does not object to its authenticity. Rather, the objection centers around the lack of authentication of the subsequent transcript and

Plaintiff's reliance on the uncertified transcript in responsive pleadings. In response to the objections regarding use of the transcript, and after an initial response had already been filed, Plaintiff submitted a copy of the video deposition to the Court. Defendant then challenged that submission as an impermissible additional response beyond that allowed under LRCi 7.1 (g), and sought sanctions against Plaintiff's counsel. Defendant requests oral argument on these issues.¹

II. DISCUSSION

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to ruling as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct 2548, 91 L. Ed 2d 265 (1986). In reviewing a motion for summary judgment, the Court must view all evidence and factual inferences in the light most favorable to the non-movant and resolve all doubts in his favor. *See Celotex*, 477 U.S. at 325. A factual issue is material if it would affect the outcome of an action and allow a reasonable jury to find for the plaintiff. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52, 106 S. Ct 2505, 2511-12, 91 L. Ed 2nd 202 (1986).

"The substantive law governing the dispute will determine which facts are material." *Fiorglio v. Atlantic City*, 996 F. Supp. 379, 384 (N.J. 1998). To survive summary judgment in a negligence claim, the plaintiff must show the presence of a genuine issue of material fact as to every

¹ The court may, in its discretion, allow oral arguments or decide motions based on the submissions. Terr. Ct. R. 36 (a). Here, the record is replete with information from which the Court may decide the issues before it. Based on the record and the issues presented, it appears that oral argument will aid little in resolution of the issues. Therefore, Defendant's request for oral argument, pursuant to LRCi 7.1 (i), is denied.

essential element. *Chelcher v. Spider Staging Corp.*, 32 V.I. 320, 331 (D.V.I. 1995). The issue of notice is a question of fact reserved for the jury, because it calls for application of the reasonable man standard which necessarily "requires full exposition of all underlying facts and circumstances." *Moore v. A.H. Riise Gift Shops*, 23 V.I. 227, 231 (D.V.I. 1987); *see also Barron v. Honeywell, Inc.*, 69 F.R.D. 390, 392 (Pa. 1975). Thus, "because of the special roles of judge versus jury in such actions," summary judgement is rarely appropriate. 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2729 (1998) (citing Restatement (Second) of Torts § 328 B, C).

A. Motions for Summary Judgment and Protective Order

Defendant argues it is entitled to summary judgment as a matter of law because Plaintiff has not established that it had notice of the specific dangerous condition which caused Plaintiff's injury, an essential element of the claim. Plaintiff argues Defendant had constructive notice of recurring leaks which created the dangerous condition.

Generally, a lessor is not liable for harm resulting from a dangerous condition on his premises. Restatement (Second) of Torts § 356 (1965).² However, there are several circumstances where a lessor may be liable for dangerous conditions which cause injury to others:

1. If the lessor contracted to repair but fails to do so and the disrepair creates an unreasonable risk to others. *See* Restatement (Second) of Torts § 357.
2. Where the lessor fails to disclose known dangerous

² The Restatements represent the law of the territory, in the absence of local law to the contrary. V.I. Code Ann. tit. 1, § 4 (1998).

conditions. *See* Restatement (Second) of Torts § 358.

3. Where the land is leased for a public purpose and the lessor fails to discover an unreasonable risk to others. *See* Restatement (Second) of Torts § 359.

4. Where the lessor retains control of part of the property. *See* Restatement (Second) of Torts § 360-61.

5. Where the lessor undertakes to make repairs and does so negligently. *See* Restatement (Second) of Torts § 362.

In the instant case, the terms of the lease provided that the defendant lessor would maintain the premises in good repair, and may enter to inspect such premises to carry out this duty to repair. Thus, Section 357 is applicable. However, this duty to repair arises only if the landlord fails to exercise reasonable care "after he has had notice of the need of repairs." Restatement (Second) of Torts § 356 cmt. d. Such notice may be actual or constructive. *See Gov't of the Virgin Islands v. Pant*, 30 V.I. 259, 265 (D.V.I. 1994). Several factors are important in determining whether there was constructive notice: the length of time of the condition; number of other persons present; location of the hazard, and type of foreign substance. *Id.*; *see also Lubick v. Travel Services, Inc.*, 23 V.I. 120, 123 (D.V.I. 1987); *David v. Pueblo Supermarket of St. Thomas*, 740 F. 2d 230, 236 (3d Cir. 1984). Constructive notice may also be found where there has been a continuous or recurring problem which should have put lessor on notice of the need for repairs. *See* 62A AM. JUR. 2d *Premises Liability* § 642 (1990).

Here, Plaintiff asserts that Defendant knew or had reason to know of the dangerous condition in the INS bathroom, because of the longstanding and recurring leaks in that area. Plaintiff

relies on deposition testimony that the defendant was aware of a roofing problem which dated to Hurricane Marilyn and which Defendant had only temporarily repaired. Additionally, Plaintiff alleges the leaks in the bathroom of the INS office had been reported to Defendant and repaired on several occasions. Plaintiff presents the deposition testimony of several witnesses to support these assertions:

Mr. Davis Glasgow, an employee of the defendant and its maintenance supervisor, testified that defendant was exclusively responsible for all maintenance repairs, both common areas and structural. He testified that such arrangement was part of the lease. He admitted that there were leaks in the ceiling after Hurricane Marilyn in 1995 and that Eagle Construction had been hired to make temporary repairs. He further stated that each complaint to his office from INS was dealt with immediately and no written reports were kept.³

Another of plaintiff's coworkers, Claudette Bird, also confirmed that there were leaks in the ceiling and the pipes and that reports had been made to the Sunny Isle office. Most significantly, Ms. Bird recounted that on the day of plaintiff's accident, she arrived at work between 6:00 and 6:30 a.m. – her usual shift – and saw water on the floor, under the sink in the women's bathroom. When asked about recurrence of leaks in the bathroom, she testified as follows: "Well, it leaks. It began to leak. Whenever there was heavy rain, it would leak, and the pipes would leak. Sometimes the toilet would overflow. It would just keep running. There is especially one, the farthest one in the corner, it would just keep running and sometimes it would overflow." Ms. Bird also testified that, subsequently, she also fell in the office.⁴

The plaintiff testified that it was customary to call defendant Sunny Isle whenever there was water on the floor . . . Plaintiff spoke of

³ Plaintiff's Opposition to Summary Judgment at 6 (internal quotation marks omitted)

⁴ Plaintiff's Opposition to Summary Judgment at 6.

numerous of such reports of leaks.⁵

Plaintiff testified at deposition, and stated in her responses to Interrogatories that the ceiling in the women's bathroom constantly leaked water onto the floor. She also stated that the sink and toilet sometimes leaked.⁶

These factual assertions, taken as true and viewed in the light most favorable to the plaintiff, present factual issues sufficient to withstand a summary judgment motion.

In its motion opposing summary judgment, Plaintiff additionally quotes to an uncertified transcript of the videotaped deposition of Ilma Petersen, another INS employee. Defendant objects to the use of this quoted testimony and seeks a protective order, arguing that the unauthenticated document lacks traditional guarantees of trustworthiness. However, notwithstanding the transcript testimony of Ilma Petersen, Plaintiff has met her burden of showing, with the aforementioned testimony of at least three other witnesses, that there exists a genuine dispute on the issue of notice. Therefore, Petersen's deposition testimony is merely cumulative evidence which need not be considered in the motion for summary judgment.⁷ See *Grisom v. Logan*, 334 F. Supp. 273, 279 (Ca. 1972)(citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed 1129 (1940)); see also *United States v. One Parcel of Real Property*, 33 V.I. 182, 899 F. Supp.

⁵ Plaintiff's Opposition to Summary Judgment at 6.

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⁷ Defendant was present at the deposition and notes that it does not question the authenticity of the deposition testimony but challenges only the transcript based on the absence of certification. The Court need not rule on the admissibility of the uncertified transcript as evidence at this time. The parties may raise the issue if the deposition is offered at trial.

1415 (D.V.I. 1995).

B. Motion to Strike and Sanctions

Finally, Defendant complains that Plaintiff's submission of a videotape after an initial responsive pleading had already been filed was an impermissible reply. Local rules governing motion practice limit to one the number of responsive pleadings that may be filed by an opposing party without leave of the court. *See* LRCi 7.1 (g). The rule prescribes sanctions for violations. *Id.* This Court disagrees with Defendant's construction of the videotape submission as a responsive pleading. Rather, the original videotape deposition was clearly submitted to allay Defendant's repeated concerns regarding the accuracy of the transcript. The writing accompanying the tape merely served as notice to the Court that the original deposition testimony was being made available; no new information or arguments were posed. This type of communication is "not the kind of adversarial document prohibited by the rule." *Griffith v. Hess Oil Virgin Islands Corp.*, 38 V.I. 460, 39 VI. 199, 5 F. Supp. 2d 336 (D.V.I. 1998). The Court, therefore, finds no violation of the local rules of civil procedure and denies Defendant's motion for sanctions.

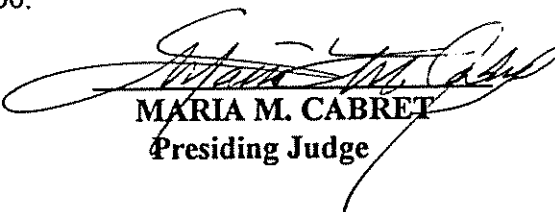
III. CONCLUSION

Based on the foregoing, Plaintiff has raised sufficient factual issues in dispute which, if believed, would afford a basis for a reasonable jury to find that Defendant had notice of the dangerous condition on its premises. Therefore, Defendant's motion for summary judgment is

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denied. For the reasons stated, Defendant's motions for protective order and sanctions are also denied.

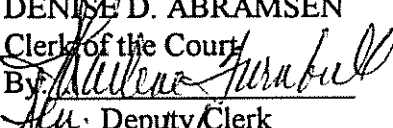
DATED: September 1, 2000.


MARIA M. CABRET
Presiding Judge

ATTEST:

DENISE D. ABRAMSEN

Clerk of the Court

By: 

Deputy Clerk

Dated: 9/5/00