

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET MCDOWELL,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 06-CV-02508
	:	
v.	:	
	:	
KMART CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Stengel, J.

July 12, 2006

This diversity action involves a slip and fall accident at a retailer's store. Margaret M. McDowell ("Plaintiff") alleges that she was seriously injured when she slipped and fell on a wet floor controlled by Kmart Corporation ("Defendant"). Presently before the Court is Defendant's motion to dismiss all of Plaintiff's recklessness claims. I will deny the motion because Defendant has failed to demonstrate that Plaintiff can prove no set of facts to support her recklessness claims under New Jersey law.

I. BACKGROUND¹

On September 2, 2005, Plaintiff slipped on a wet floor while walking on the premises of Defendant's store located in Rio Grande, New Jersey. As a result of her fall, Plaintiff suffered serious bodily injuries and filed this lawsuit in the Philadelphia Court of Common Pleas on May 25, 2006. Plaintiff's complaint alleges, *inter alia*, that

¹The facts are taken from the complaint and are accepted as true for the purposes of this motion.

"Defendant was careless, negligent and reckless" by: (1) maintaining a dangerous condition on its premises which it knew or had reason to know presented an unreasonable risk of harm; (2) failing to inspect its premises; (3) failing to warn Plaintiff of the dangerous condition; and (4) failing to use due care under the circumstances. On June 13, 2006, Defendant removed the case to federal court on the basis of diversity jurisdiction², and filed the instant motion to dismiss on the following day. Plaintiff has not opposed the motion.

II. CHOICE OF LAW

As an initial matter, I must determine whether Pennsylvania or New Jersey law applies in this case, despite the fact that the parties have not raised the issue. A federal court sitting in diversity applies the choice of law rules of its forum state. Klaxon v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941); Yohannon v. Keene, 924 F.2d 1255, 1264 (3d Cir. 1991). Pennsylvania has rejected the *lex loci delicti*³ rule under which the law of the state where an accident occurred governs any litigation arising from that accident. Griffith v. United Air Lines, Inc., 203 A.2d 796, 805 (Pa. 1964). Instead, Pennsylvania's

²There is complete diversity in this case because Plaintiff is a Pennsylvania resident and Defendant is a Michigan Corporation. See 28 U.S.C. § 1332(a). The amount in controversy requirement is met because Defendant has averred in its notice of removal that the amount in controversy exceeds \$75,000.00. Id.

³Black's Law Dictionary defines *lex loci delicti* as "[t]he law of the place where the offense was committed." BLACK'S LAW DICTIONARY (8th ed. 2004).

choice of law approach combines the Restatement (Second) of Conflict of Laws' contacts analysis with a governmental interest analysis. See Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991) (citing Griffith, 203 A.2d at 805).

Pennsylvania's choice of law analysis is comprised of two separate steps. Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 463 (3d Cir. 2006) (citations omitted). First, courts compare the interests of the competing states to determine whether the conflict between them is "true" or "false." LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996). Second, should the court find that there is a "true" conflict, the interests of both states are compared and the law of the state with the more significant interest is applied. Id. Courts determine the significance of a state's interests by assessing the "contacts each state has with the accident, the contacts being relevant only if they relate to the 'policies and interest[s] underlying the particular issue before the court.'" Cipolla v. Shaposka, 267 A.2d 854, 856 (Pa. 1970) (quoting Griffith, 203 A.2d at 805).

In Ramey v. Wal-Mart, Inc., 967 F. Supp. 843, 844-45 (E.D. Pa. 1997), the court considered the very issue before the Court here. The plaintiff in Ramey, a Pennsylvania resident, filed a complaint based on diversity jurisdiction and alleged that she had slipped and fell at a Wal-Mart store in New Jersey. Id. at 844. The court determined that New Jersey had a number of significant interests in applying its law to the litigation. Id. at 845. First, the Ramey court held the fact that the defendant's store was located in New

Jersey weighed heavily in favor of applying New Jersey law. Ramey, 967 F. Supp. at 845. The court noted that while Pennsylvania has rejected strict adherence to *lex loci delicti*, the location of the accident "remains especially important in cases in which the claim arises from 'the use of and condition of property, traditionally matters of local control.'" Id. at 845 (citing Shuder v. McDonald's Corp., 859 F.2d 266, 269, 70 (3d Cir. 1988)).

Second, the Ramey court found that the defendant could reasonably be expected to fashion its conduct according to New Jersey law because its store was located in that state. Id. at 845. This reason, as well as the fact that the plaintiff had traveled to New Jersey to visit the store, also weighed in favor of applying New Jersey law. Id. at 845.

Finally, the court noted that New Jersey had an interest in the safety of the maintenance of property within its borders, as well as a significant interest in the safety of its visitors. Id. at 845. For these reasons, the Ramey court determined that New Jersey "clearly had more significant contacts" than Pennsylvania, and held that New Jersey law applied to the litigation. Id. at 845.

The facts in the instant case are remarkably similar to the facts presented in the Ramey case. As in Ramey, Plaintiff here is a Pennsylvania resident suing a foreign defendant corporation in the Eastern District of Pennsylvania. Moreover, Plaintiff's

lawsuit arises from a slip and fall incident that occurred in Defendant's New Jersey store. I find that the interests of New Jersey articulated by the Ramey court are equally applicable in this case. Accordingly, I will apply New Jersey law to this case.

III. STANDARD FOR A MOTION TO DISMISS

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). Courts may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)). When considering a motion to dismiss, courts must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id. See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984).

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. See id. See also FED. R. CIV. P. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief"). A plaintiff,

however, must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995).

IV. DISCUSSION

Traditional common law landowner liability premised a landowner's duty of care upon a visitor's status as a trespasser, licensee/social guest, or business invitee. Sussman v. Mermer, 862 A.2d 572, 574 (N.J. Super. Ct. App. Div. 2004) (citing Parks v. Rogers, 825 A.2d 1128, 1131 (N.J. 2003)). The legal principles governing a landowner's liability in New Jersey, however, have "undergone transition toward 'a broadening application of a general tort obligation to exercise reasonable care against foreseeable harm to others.'" Id. (quoting Hopkins v. Fox Lazo Realtors, 625 A.2d 1110, 1114 (N.J. 1993)). New Jersey courts consider the circumstances surrounding a case and then determine whether it is fair and just to impose liability on the landowner. Id.

In assessing whether the imposition of liability on a landowner is fair, New Jersey courts consider the following four factors: (1) the relationship of the parties; (2) the nature of the attendant risk; (3) the opportunity and ability to exercise care; and (4) the public interest in the proposed solution. Hopkins, 625 A.2d at 1116. Despite New Jersey's apparent break from traditional common law landowner liability, however, it

remains clear that "[b]usiness owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation."

Nisivoccia v. Glass Gardens, Inc., 818 A.2d 314, 316 (N.J. 2003).

Section 500 of the Restatement (Second) of Torts, cited by the New Jersey courts with apparent approval, summarizes the definition of recklessness. See Schick v.

Ferolito, 767 A.2d 962, 969 (N.J. 2001) (quoting Restatement (Second) of Torts § 500);

Dunlea v. Township of Belleville, 793 A.2d 888, 892-93 (N.J. Super. Ct. App. Div.

2002) (same). Section 500 defines a "reckless disregard of safety," and provides:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 566.

The complaint in this case alleges, *inter alia*, that Defendant recklessly maintained a condition on its premises which presented an unreasonable risk of harm and that Defendant failed to inspect its premises to ensure the safety of persons visiting its store. I find it unlikely that Defendant acted recklessly in this case, but I am unable to say that "it appears beyond a reasonable doubt" that Plaintiff can prove no set of facts that would entitle her to relief. For example, Defendant's employees could have noticed that a portion of the store's floor was wet and consequently knew that the floor presented an

unreasonable risk of harm to customers. It is also possible that Defendant not only knew of the risk to its customers, but recklessly disregarded their safety by failing to take precautions against persons walking on the wet portion of the floor.

While the factual allegations behind this claim are not particularly detailed, the Federal Rules of Civil Procedure require only a "short and plain statement" of a plaintiff's claim that will give the defendant fair notice and the grounds upon which the claim rests. See FED. R. CIV. P. 8(a). After taking all reasonable inferences in Plaintiff's favor, I find that the facts alleged in the complaint meet the requirements of Rule 8(a) and could support a finding of recklessness. I will therefore deny Defendant's motion.

V. CONCLUSION

For the reasons described above, I find that New Jersey law applies in this case, and I will deny Defendant's motion to dismiss. An appropriate Order follows.

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v.	:	
	:	
KMART CORPORATION,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 12th day of July, 2006, upon consideration of Defendant's Motion to Dismiss Recklessness Allegations (Docket No. 2), it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.