

Mirando v Colonial Ctr. Co.

2001 NY Slip Op 30002(U)

October 22, 2001

Supreme Court, Suffolk County

Docket Number: Index No. 26995-1998

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

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PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #002 & 003-MD
R/D: 030601
S/D 082001

JOSEPH MIRANDO

Plaintiff,

- against -

PLTF'S/PET'S ATTY:
WEINGRAD & WEINGRAD, LLP
350 Fifth Avenue
New York, New York 10118

COLONIAL CENTRE COMPANY and K.K.S. HOME
REMODELERS, INC.

Defendants.

DEFT'S/RESP'S ATTY:
MORENUS, CARDOZA & CONWAY, ESQS.
(K.K.S. Home)
1400 Old Country Road
Westbury, New York 11590

MICHAEL F. X. MANNING, ESQ. (Colonial)
1225 Franklin Avenue
Garden City, New York 11530

Upon the following papers numbered 1 to 31 read on this motion and cross motion for an order pursuant to CPLR §3212

Notice of Motion/Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers 12-16
Answering Affidavits and supporting papers 17-21; 22-27 Replying Affidavits and supporting papers 28-29; 30-31
Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant K.K.S. HOME REMODELERS INC. ("KKS") and the cross motion by defendant COLONIAL CENTRE COMPANY ("CCC") each seeking an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiff's complaint and all cross claims against them are determined as follows:

On March 27, 1998 plaintiff JOSEPH MIRANDO ("MIRANDO") claims that he fell on a plywood ramp on premises owned by defendant "CCC". "MIRANDO" used the ramp as an entranceway to his office. Under the terms of a December, 1997 agreement between "CCC" and defendant "KKS", "KKS" installed a new handicap ramp and subfloor. "KKS" claims the ramp was completed sometime in January, 1998.

Defendant "KKS's" motion seeks an order granting summary judgment dismissing plaintiff's complaint and all cross claims against it claiming that no legal basis exists upon which movant can be found liable for plaintiff's injuries. In support, movant submits two affirmations of counsel which recite relevant portions of the parties deposition testimony. Defendant claims that "KKS" employees properly installed the new handicap ramp and no evidence exists to prove that an alleged hole existed in the plywood at the time of installation or to show that the plywood was otherwise defective. Movant asserts that "KKS's" work conformed to the owner's specifications and was deemed satisfactory after inspection by the town building inspector and by "CCC's" agents. It is defendant's position that no relevant, admissible evidence exists to

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support plaintiff's claims that the plywood lacked structural integrity and therefore plaintiff's complaint and all cross claims against "KKS" must be dismissed.

In support of its cross motion for summary judgment, defendant "CCC" submits an attorney's affirmation and claims that plaintiff has failed to establish a prima facie case of negligence against "CCC". Movant contends that no proof exists to show that "CCC" either created or had actual or constructive notice of the claimed dangerous condition which caused "MIRANDO's" injuries. Defendant claims that absent such proof, plaintiff's complaint must be dismissed.

In opposition to both motions, plaintiff submits an affidavit, two affidavits from a licensed professional engineer, affidavits from two "CCC" employees and from a witness who saw plaintiff fall together with two affirmations of counsel. Plaintiff claims that substantial issues of fact exist concerning the negligence of the defendant/contractor "KKS" and the defendant/owner "CCC" proximately causing his injuries. Plaintiff's expert claims that the plywood installed by "KKS" had wood knots which were not properly treated and secured. Plaintiff claims that defendant failed to adequately treat the plywood causing it to perforate and create a depression in the surface where plaintiff fell. It is plaintiff's position that significant questions of fact exist under these circumstances sufficient to defeat defendants applications.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (PALKA v. EDELMAN, 40 NY2d 781, 390 (NYS2d 393 (1976); PALSGRAF v. LIRR CO., 248 NY 339 (1928); Prosser, "Torts" 4 Edition §30, 41-42 and 53)). He must further demonstrate that defendants' acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (SHEEHAN v. CITY OF NEW YORK, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (BARSO v. MILLER, 40 NY2d 233, 241, 386 NYS 2d 564 (1976); SMITH v. TAYLOR, ___ AD 2d ___, 719 NYS 2d 686 (2d Dept., 2001)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the

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undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (MARTINEZ v. SANTORO, ___ AD 2d ___, 710 NYS 374 (2d Dept., 2000); SADLER v. TOWN OF HURLEY, ___ AD 2d ___, 720 NYS 2d 613 (3rd Dept., 2001).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property (BALSAM v. DELMA ENGINEERING CORP., 139 AD 2d 292, 296-297 (1st Dept., 1988) leave to appeal denied, 73 NY2d 783 (1989); PAPPALARDO v. NY HEALTH & RACKET CLUB, ___ AD 2d ___, 718 NYS 2d 287 (1st Dept., 2000).

In a slip and fall case a plaintiff may only recover when he is able to show that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition (ANDERSON v. KLEIN'S FOODS, 139 AD2d 904 (4th Dept., 1988), aff'd 73 NY2d 835 (1989); MOSS v. JNK CAPITAL, 211 AD2d 769, 621 NYS2d 679 (2d Dept., 1995)). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (GORDON v. AMERICAN MUSEUM OF NATURAL HISTORY, 67 NY2d 836 (1986); FASOLINO v. FASHION BUG, 77 NY2d 847, 567 NYS2d 640 (1991)).

Based upon the submission of evidence by the parties, substantial issues of fact exist concerning defendants negligence sufficient to require a plenary trial. Defendants motions for summary judgment must therefore be denied. Accordingly, it is

ORDERED that defendant "KKS's" motion and defendant "CCC's" cross motion each seeking an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiff's complaint and all cross claims against them are denied.

Dated: October 22, 2001

MELVYN TANENBAUM

J.S.C.