Ford v Town of Babylon
2007 NY Slip Op 30152(U)
March 5, 2007
Supreme Court, Suffolk County
Docket Number: 0027654
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX NO. 03-27654
CAL. NO. 06-01391-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-20-06 (#002)
MOTION DATE 10-20-06 (#003)
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - MD

---X
ANNA-LISA FORD and KEVIN FORD,

Plaintiffs,

– against –

TOWN OF BABYLON, WASTE MANAGEMENT, INC., N.P.S. PROPERTY CORP. and NORMANDY GARDEN APARTMENTS,

Defendants.
---X

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Upon the following papers numbered 1 to 45 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 21 - 35 ; Notice of Cross Motion and supporting papers ________; Answering Affidavits and supporting papers 36 - 41 ; Replying Affidavits and supporting papers 42 - 43; 44 - 45 ; Other ________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Town of Babylon and Waste Management, Inc. and the motion by defendants N.P.S. Property Corp. and Normandy Garden Apartments are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Town of Babylon and Waste Management, Inc. for summary judgment in their favor is granted; and it is further

ORDERED that the motion by defendants N.P.S. Property Corp. and Normandy Garden Apartments for summary judgment in their favor is denied.

Plaintiff Anna-Lisa Ford commenced this action to recover damages for personal injuries sustained on August 25, 2002, when she allegedly slipped and fell on a clear plastic bag that was located on the stoop outside her apartment door. Her husband, plaintiff Kevin Ford, sued derivatively for loss of services. At the time of the accident, plaintiff and her husband resided at a residential complex known as Normandy Garden Apartments, which is owned by defendant N.P.S. Property Corp. and located in defendant Town of Babylon. It is undisputed that in August 2002, defendant Waste Management, Inc. had a contract with the Town to provide dumpsters at the Normandy Gardens complex and to regularly remove the garbage from such dumpsters.

The bill of particulars alleges that the source of the plastic bag was a defective dumpster located in front of plaintiffs' apartment. It alleges, among other things, that the dumpster had a broken lid, which allowed debris to be carried out by the wind, and that defendants had notice of such condition. It further alleges that defendants were negligent in failing to maintain the parking lot in a reasonably safe condition; in failing to correct a known hazardous condition; and in placing the dumpster "in an area which would likely cause injuries to persons working in the area."

At a deposition conducted in June 2004, plaintiff testified that she did not see the plastic bag on the stoop before she fell. She testified that she did not know what caused her to foot to slip until after she fell, when her husband discovered a clear plastic bag on the toe of her shoe. Plaintiff further testified that prior to the accident she observed that the lid was broken off the dumpster, and that she advised the superintendent of the complex that debris was blowing out of the dumpster.

Defendants Town of Babylon and Waste Management now move for summary judgment dismissing the complaint and the cross-claim against them on the ground that there is no evidence that the plastic bag that allegedly caused plaintiff's fall came from the dumpster. The Town and Waste Management further assert that they had no duty to maintain the grounds at Normandy Gardens, and that they had no notice that debris was blowing out of the dumpster or that the lid of the dumpster was broken. Defendants N.P.S. Property and Normandy Garden Apartments also move for summary judgment in their favor, arguing that there is no evidence that the plastic bag that allegedly caused plaintiff's fall came from the dumpster. Plaintiffs oppose the motion, alleging that a triable issue exists as to whether defendants had notice that the subject dumpster created a hazardous condition at the apartment complex. The Court notes that the sur-reply submitted by plaintiffs was improper (*see*, CPLR 2214), and was not considered in its determination of the motions.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her

injuries (*see*, ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. "'Proof of negligence in the air, so to speak, will not do'" (***Martin v Herzog***, 228 NY 164, 170, 126 NE 814 [1920], *quoting* Pollock, Torts (10 th Ed.), p. 472). And while proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must demonstrate prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see*, ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Forman v City of White Plains***, 5 AD3d 434, 773 NYS2d 102 [2d Dept 2004]).

Further, to establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see*, ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). A plaintiff is not required to prove the exact nature of the defendant's negligence (*see*, ***Gayle v City of New York***, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see*, ***Burgos v Aqueduct Realty Corp.***, 92 NY2d 544, 550, 684 NYS2d 139 [1998]; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Schneider v Kings Hwy. Hosp. Ctr.***, *supra*) to meet this burden. Rather, a plaintiff must offer evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (***Gayle v City of New York***, *supra*, at 937, 680 NYS2d 900; *see*, ***Grob v Kings Realty Assocs.***, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; ***New York Tele. Co. v Harrison & Burrowes Bridge Contrs.***, 3 AD3d 606, 771 NYS2d 187 [3d Dept 2004]; ***Collins v City of New York***, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]). Plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see*, ***Gayle v City of New York***, *supra*; ***Bernstein v City of New York***, *supra*; ***Bardi v City of New York***, *supra*).

To establish liability in a slip-and-fall case, a plaintiff must show that the defendant created the condition that caused the accident or had actual or constructive notice of its existence (*see*, ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Cappolla v City of New York***, 302 AD2d 547, 755 NYS2d 100 [2d Dept], *lv denied* 100 NY2d 511, 766 NYS2d 165 [2003]; ***Goldin v Riker***, 273 AD2d 197, 709 NYS2d 119 [2d Dept 2000]; ***Aversano v City of New York***, 265 AD2d 437, 696 NYS2d 233 [2d Dept 1999]; ***Beltran v Metropolitan Life Ins. Co.***, 259 AD2d 456, 686 NYS2d 79 [2d Dept 1999]). To constitute constructive notice, the defect must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (*see*, ***Gordon v American Museum of Natural History***, *supra*; ***Curiale v Sharrotts Woods, Inc.***, 9

AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Lee v Bethel First Pentecostal Church of Am.***, 304 AD2d 798, 762 NYS2d 80 [2d Dept 2003]). In addition, a defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of such condition (*see*, ***Brown v Linden Plaza Hous. Co.***, __ AD3d __, 2007 WL 180954 [2d Dept, Jan. 23, 2007]; ***Roussos v Ciccotto***, 15 AD3d 641, 792 NYS2d 501 [2d Dept 2005]; ***Osorio v Wendell Terrace Owners Corp.***, 276 AD3d 540, 714 NYS2d 116 [2d Dept 2000]).

The Town and Waste Management met their burden on the motion by showing that they did not create the alleged dangerous condition on the step outside of plaintiff's front door or have any notice such condition existed (*see*, ***Perlongo v Park City 3 & 4 Apts.***, 31 AD3d 409, 818 NYS2d 158 [2d Dept 2006]; ***DeLeon v New York City Tr. Auth.***, 5 AD3d 531, 772 NYS2d 874 [2d Dept 2004]; ***Carlos v New Rochelle Mun. Hous. Auth.***, 262 AD2d 515, 692 NYS2d 428 [2d Dept 1999]). They also presented evidence showing that they had no notice that the dumpster at issue was defective. The burden, therefore, shifted to plaintiffs to raise a triable issue of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

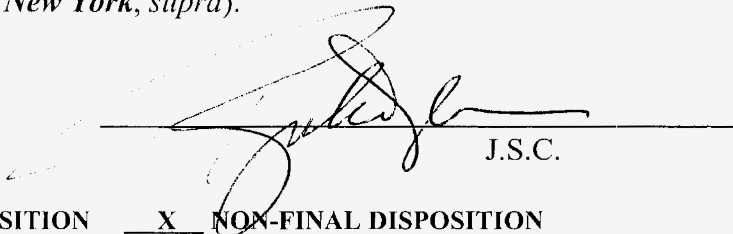
Here, there is no evidence, only speculation, that the plastic bag on the step outside plaintiffs' door was caused by Waste Management's failure to properly maintain the garbage dumpster located in the parking lot outside of plaintiffs' apartment (*see*, ***John v Tishman Constr. Corp. of N.Y.***, 32 AD3d 458, 819 NYS2d 475 [2d Dept 2006]; ***Love v Home Depot U.S.A.***, 5 AD3d 636, 774 NYS2d 765 [2d Dept 2004]; ***Zarbaliyeva v Fone Mgt. Enters.***, 300 AD2d 581, 751 NYS2d 878 [2d Dept 2002]; ***Segretti v Shorenstein Co., E.***, 256 AD2d 234, 682 NYS2d 176 [1st Dept 1998]). In fact, as there is no evidence as to how long the plastic bag was present on the step, no inference may be made that the Town or Waste Management had constructive notice of the condition (*see*, ***Deveau v CF Galleria at White Plains***, 18 AD3d 695, 796 NYS2d 119 [2d Dept 2005]; ***Gilliam v White Castle***, 8 AD3d 428, 780 NYS2d 18 [2d Dept 2004]; ***Kraemer v K-Mart Corp.***, 226 AD3d 590, 641 NYS2d 130 [2d Dept 1996]).

Moreover, plaintiffs failed to present evidence showing that the Town or Waste Management had notice that debris overflowing from the dumpster created a recurring problem on the property (*see*, ***Kobiashvilli v Hill***, 34 AD3d 747, ___ NYS2d ___ [2d Dept 2006]; *cf.*, ***Montalvo v Western Estates***, 240 AD2d 45, 669 NYS2d 562 [1st Dept 1998]). To raise a triable issue as to whether the Town or Waste Management had notice of a recurring hazard at the apartment complex, plaintiffs were required to show by specific factual references that these defendants had actual knowledge that debris from the dumpster regularly ended up on the steps and walkways outside of the apartments (*see*, ***Kobiashvilli v Hill***, 34 AD3d 746, 825 NYS2d 234 [2d Dept 2006]; ***Stone v Long Is. Jewish Med. Ctr.***, 302 AD2d 376, 754 NYS2d 352 [2d Dept 2003]). Plaintiff's deposition testimony and self-serving affidavit that she repeatedly cleaned debris outside her apartment door, and that she advised the apartment superintendent about the garbage problem, is insufficient to show that the Town or Waste Management had notice of a recurring dangerous condition due to the alleged defective dumpster (*see*, ***Kobiashvilli v Hill***, 34

AD3d 747, ___ NYS2d ___ [2d Dept 2006]; ***Smith v Funnel Equities***, 282 AD2d 445, 723 NYS2d 194 [2d Dept 2001]). Likewise, the conclusory affidavit by a nonparty witness that garbage from the dumpster repeatedly collected on the stoops outside the front doors of the apartments, and that she advised the superintendent of apartment complex of such condition, is insufficient to raise a triable issue as to whether the Town or Waste Management had notice of such condition (*see*, ***DeLeon v New York City Tr. Auth.***, *supra*; ***Grottano v City of New York, Dayton Beach Park No. 1 Corp.***, 304 AD2d 713, 757 NYS2d 795 [2d Dept 2003]). Accordingly, the motion for summary judgment dismissing the claims against the Town of Babylon and Waste Management is granted.

Summary judgment dismissing the claims against defendants N.P.S. Property Corp. and Normandy Garden Apartments, however, is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see*, ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004];***Gaines v Shell-Mar Foods***, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]). The Court's computerized records show that the note of issue was filed for this action on June 8, 2006. The motion for summary judgment in favor of N.P.S. Property Corp. and Normandy Garden Apartments was made on October 11, 2006, the date which it was served (*see*, CPLR 2211). As there is no explanation in the papers for the delay in making the application, the Court must deny the summary judgment motion by N.P.S. Property and Normandy Garden Apartments on the basis that it was made 125 days after the filing of the note of issue (*see*, ***Miceli v State Farm Mut. Auto. Ins. Co.***, *supra*; ***Brill v City of New York***, *supra*).

Dated: MAR 05 2007



J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION