

Ponton v RCPI Landmark Props., LLC

2007 NY Slip Op 30828(U)

April 11, 2007

Supreme Court, New York County

Docket Number: 0108687/2004

Judge: Judith J. Gische

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JUDITH J. GISCHE, J.S.C.

PART _____

Index Number : 108687/2004

PONTON, LORRAINE

vs

RCPI LANDMARK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

APR 20 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/11/07

JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
Lorraine Ponton and Robert Ponton

Plaintiffs,

-against-

RCPI landmark Properties, LLC;
RCP, XI, Inc., Cablevision Systems Corporation
Madison Square, Garden, LP and
Radio City Productions, LLC

Defendants.
-----X

Decision/Order
Index# 108687/04
Mot. Seq. #003

Present:
Hon. Judith J. Gische
J.S.C

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Notice of Motion, RET affirm., DJ affd., exhibits.....	1
CEP Affirm. In opp, exhibits.....	2
RET reply affirm.....	3
MDPO-D affirm.....	4

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Defendants Cablevision Systems Corporation, Madison Square Garden, L.P. and Radio City Productions LL (collectively "defendants") move for summary judgment dismissing the complaint. ¹ Plaintiffs oppose the motion. Issue has been joined, discovery is complete and the Note of Issue has been filed. CPLR § 3212. This motion is otherwise timely and will be considered by the court on its merits. Brill v. City of New York, 2 NY3d 648 (2004).

¹Plaintiffs discontinued their case against RCPI Landmark Properties LLC. The current status of the case against RCP XI, Inc. is unclear.

Plaintiff Lorraine Ponton ("LP") is suing for personal injuries that she sustained on December 10, 2003 after falling down the bottom three steps while descending the Grand Foyer Staircase at Radio City Music Hall. Robert Ponton, her spouse, is suing for loss of services. Although throughout the case several alternate theories of liability were advanced, at this stage in the proceedings, the primary theories relied upon concern plaintiffs' claims that the carpet design created an optical illusion that prevented LP from seeing that the steps continued.² LP claims that this illusion, that the stairway ended, was reinforced by the fact that from the fourth to the last step the handrail curved outward. As a result, LP claims that when she thought she was placing her foot firmly on the floor, she was actually only placing it on the edge of a step, causing her to lose her balance and fall.

Defendants argue that they are entitled to summary judgment as a matter of law because: [1] the claimed condition does not violate any laws, rules or regulations, [2] the design of the carpet and the handrail are protected by landmark status and [3] the lack of a handrail was not the proximate cause of LP's accident.

Plaintiffs argue that landmark status does not absolve defendants of taking reasonable measures to make a premises safe. They further argue that the handrail violates building code provisions. Finally they argue that the illusion was created by a combination of the carpet's design or pattern and the curving of the handrail, which both caused LP to fall.

Although not expressly conceded, plaintiffs do not oppose defendants arguments that she cannot prove that there was a foreign substance on the stairs which caused her to slip.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its prima facie case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). Once an issue of fact is identified, the court's examination ends. The court's function is limited to issue finding, not issue determination. Brunetti v. Musallam, 11 AD3d 280 (1st dept. 2004).

An owner of a building has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable. Tagle v. Jacob, 97 NY2d 165 (2001); Perez v. Bronx Park South, 285 AD2d 402 (1st dept 2001). Liability will attach where it can be proven that: [1] the premises were not reasonably safe (Revil v. Boston Post Road Development Corp., 293 AD2d 138 [1st dept. 2002]), [2] the defendants were negligent in not keeping the premises in a reasonably safe condition (Murphy v. Connor, 84 NY2d 969 [1994]) and [3] defendants' negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injuries. (Lynn v. Lynn, 216 AD2d 194 [1st dept, 1995]). See, generally: PJI 2:90, 2:91.

Violation of Building Codes

A violation of a particular statute may establish negligence per se while the

violation of a particular ordinance may only constitute evidence of negligence.

Violations of the Administrative Code of the City of New York is considered evidence of negligence. Elliot v. New York, 95 NY2d 730 (2001). In plaintiffs' supplemental bill of particulars they claim that the defendants violated the following provisions of the Administrative Code of the City of New York: NYC Construction Codes §§27-375(f), 27-127 and 27-128. Defendants argue that these code provisions were enacted in 1968. They have presented evidence that Radio City Music Hall was built well before the enactment of the 1968 code and was first opened to the public in 1932. They have established that the stairway is the same as it was when the building first opened. This establishes defendants' *prima facie* case that, as a matter of law, they cannot be found negligent for violating the 1968 Administrative Code. Pappalardo v. New York Health and Racquet Club, 279 AD2d 134 (1st dept. 2000).

In opposition to this argument plaintiffs rely on a February 3, 2005 letter from Stanley H. Fein PE, which states that :

"It should be noted that Section 27-127 and Section 27-128 of the New York City Building Construction Code requires that an owner shall be responsible at all times for the safe maintenance of the building and its facilities."

The letter is an unsworn statement. Since the expert testimony offered by plaintiffs is not in admissible form, it is insufficient opposition to defendants' summary judgment motion. Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 (2004). In any event, neither this letter, nor any other evidence proffered by plaintiffs rebuts defendants' evidence, that the 1968 Building Construction Code does not apply to Radio City Music Hall.

Landmark Status

Defendants argue that because the carpet and the staircase were granted landmark status, there is nothing they could have or should have been required to do to change the carpeting and handrail. It is undisputed that the carpet designs and the handrail are expressly included in the landmark designation of Radio City Music Hall made on March 28, 1978. Defendants have shown that the carpet was designed by a renown designer, Ruth Reeves, and that the actual design is exhibited at the Cooper-Hewitt Museum. It has shown that when it last undertook to renovate the lobby at Radio City Music Hall in 1999, the Landmark Commission insisted that the carpet be matched nearly perfectly, even as to gradient of color. Defendants have also produced evidence that no optical illusion exists, including the absence of any prior accidents attributable to such alleged illusion and the depositions of the LP's companions on the date of the incident where they state that they were able to successfully navigate the staircase that evening.

In opposition plaintiffs' rely upon the unsworn letter of Engineer Fein and the testimony of LP and her evening companions. The court has already ruled that Engineer Fein's unsworn letter is insufficient to defeat a motion for summary judgment. The Appellate Division of this department has squarely held, however, that expert testimony is not necessary to prove optical illusions. Chafoulias v. 240 E. 55th Street Tenants Corp., 141 AD2d 207 (1st dept. 1988). Thus, the testimony of LP and her evening companions, which affirmatively swear to the existence of an optical illusion based upon their personal observations, are sufficient to create a factual issue for the jury to decide.

Even if the jury makes an initial finding that carpet and handrail create an optical illusion that is dangerous condition, plaintiffs must still prove that the defendants were negligent in not addressing the condition. A landowner is only required to do what is reasonable under the circumstances to make a premises safe. A valid defense may be that it is unduly burdensome for defendants to have acted. Scurti v. City of New York, 40 NY2d 433 (1976); Basso v. Miller, 40 NY2d 233 (1976).

The thrust of defendants arguments is that because the landmark designation prohibited them from making any changes, as a matter of law, they cannot be found negligent for not making such changes. Plaintiffs claim is that if a dangerous condition exists, the defendants are not entitled to ignore it simply because of the landmark designation. They argue that defendants could and should have done any number of things to make the staircase safer, including, for example, posting warning signs, using tape or bullnoses on the steps to demarcate them, or even making an application to the Landmark Commission for permission to make a harmonious or appropriate alteration to the staircase.

In the case of Chalfoulias v. 240 E. 55th Street, *supra*, the Appellate Division of this department held that the issue of whether a building owner was negligent in failing to make an optical illusion in an entry way stairs safe was for the jury to decide. This case would be almost identical to Chalfoulias, except for the fact that the architectural features in questions in this case have been designated as a landmark. There is, however, no case law nor statutory support that landmark designation creates an exception to the general common law. While such landmark designation might provide some evidence of whether there is an optical illusion in the first instance or what

measures are reasonable under the circumstances, the issue of whether the owner acted reasonably remains a factual one for the jury to decide. Once a legal duty is found to exist, whether and to what extent a duty is breached is usually a question for the jury. Tagle v. Jakob, supra; Capo v. Karfunkel, 1 AD3d 48 (2nd dept. 2003).

Defendants argue that New York City Administrative Code §25-305(a)(1) makes it unlawful for anyone to alter, reconstruct or demolish an interior landmark, and therefore, they should not be held liable for obeying the law. The legal prohibition against alteration, etc., however, is not without exception. The prohibition is only in effect "unless the commission has previously issued a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work." Assuming that the corrections proposed by plaintiffs even constitute an alteration as that term is used in the landmark laws, it is clear that exceptions can be and are made. Exceptions should be permitted if conditions exist on landmark property that is dangerous to members of the public. This exception is expressly recognized in Administrative Code §25-312 to the landmark laws which, under certain circumstances, permits an owner to proceed without the prior issuance of a certificate of no effect and/or certificate of appropriateness to remedy a dangerous condition. While the procedure contained in Administrative Code §25-312 is not strictly applicable to the circumstances here, it supports the conclusion that landmark status is not an amulet that would allow an otherwise dangerous condition to exist, or abrogate the common law regarding an owner's obligation to maintain its building in a reasonably safe condition.

Thus, in this case if the jury decides that an unsafe condition exists, it will then

have to also decide whether the defendants were negligent in addressing or failing to address the condition.

Lack of Causation

Defendants alternatively claim that because plaintiffs cannot prove that the curvature of the handrail was a proximate cause of the accident, they are entitled to summary judgment. In making this argument defendants rely upon the proposition of law that unless a stairway in a public premises violates a statutory handrail requirement, the owner may not be held liable for maintaining a dangerous stairway simply because the handrail is absent, unless the steps are not themselves defective. Jung v. Kum Gang, Inc., 22 AD3d 441 (2nd dept. 2005), United Bank and Trust Co of Los Angeles v. Hattie Carnegie, Inc., 1 AD2d 199 (1st dept. 1956). The court has already concluded that the design of the handrail did not violate any applicable ordinance. Defendants claim further that in the absence of proof that the stairs were defective, no liability attaches to them on account of the structure of the handrail.

This is too limited an argument of what may constitute a defect in the stairs. An optical illusion caused by the covering on the stairs may constitute a defect. Defendants argument is also in direct contradiction of the first department's decision in Chafoulias v. 240 East 55th Street Tenants Corp., *supra*, which reinstated a complaint on a theory that the location and appearance of entry way stairs created a dangerous condition that may have required the landlord to provide a handrail, even though there was no code violation relating to any handrail.

Conclusion

In accordance herewith it is hereby:

ORDERED that defendants motion for summary judgment dismissing the complaint is granted only to the extent that plaintiffs may not proceed on theories of liability based upon a claim of a foreign substance and/or violation of any statute or ordinance , and it is further

ORDERED that defendants' motion for summary judgment is otherwise denied, and it is further

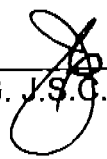
ORDERED that plaintiffs shall serve a copy of this order upon the trial support office within the next 30 days so that the case may be calendared for trial, and it is further

ORDERED that any requested relief not otherwise expressly granted is denied, and it is further

ORDERED that this shall constitute the decision and order of the court.,

Dated: New York, New York
April 11, 2007

SO ORDERED:



J.G. J.S.C.

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE