

Poey v Columbia Univ.

2007 NY Slip Op 31862(U)

June 22, 2007

Supreme Court, New York County

Docket Number: 0110105/2003

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

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART _____

Index Number : 110105/2003

POEY, LINDA

vs

COLUMBIA UNIVERSITY

Sequence Number : 001

SUMMARY JUDGMENT

EX NO. _____

FILED DATE _____

FILED SEQ. NO. _____

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

FILED

JUN 28 2007

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 6/22/07


JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
LINDA POEY,
Plaintiff,

Index No.: 110105/03
Seq. No. : 001

-against-

COLUMBIA UNIVERSITY,
Defendant.
-----X

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

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Def's motion [sj] w/ESS affirm in support, exhs	Numbered	1
Pltf's GHS affirm in opp, exhs		2

FILED
JUN 28 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

This is a personal injury action by plaintiff Linda Poey ("Poey" or plaintiff).

Defendant Columbia University ("Columbia" or defendant") now moves for summary judgment against plaintiff on the grounds that plaintiff's alleged personal injury did not take place on defendant's property and that plaintiff cannot prove the existence of any defect. Plaintiff opposes the instant motion.

Issue has been joined and since the motion was brought timely after the note of issue was filed, it will be considered on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Background

Poey alleges in her complaint and bill of particulars that on February 21, 2002 at approximately 10 p.m., she sustained personal injuries when she slipped and/or tripped

and fell (the "accident") at a stairway located at 630 West 168th Street (the "premises"). The premises is owned and maintained by defendant.

Poey was deposed with the assistance of a Spanish interpreter. During her deposition, defendant's attorney, Bonnie L. Porzio, asked Poey if defendant's Exhibit "D" showed where the alleged accident took place. Defendant's Exhibit "D" depicted a series of steps outside the premises leading to an entrance to the premises. Mark J. Elder, Esq. was present representing Poey. The transcript reads as follows:

"Q. Does that picture show where your accident took place?

A. No.

Elder: Is that the door you walked out or did you walk out some other door?

Poey: Yes, from there (indicating).

Q. Ms. Poey, is this the door that you walked out of immediately prior to your accident?

A. Yes.

Q. Did your accident occur someplace in this picture?

A. On the second step there (indicating).

Q. The second step from the top or the second step from the bottom?

A. No, the second one from here (indicating).

...

Q. Can you show me exactly where on the step your accident took place?

Elder: Its really not the best picture. Let's go off the record. (Whereupon, an off-the record discussion was held.

A. I have to see the others.

Q. I want to know if you can tell me in this picture. Does this picture depict

where your accident took place and if it does not, then just say no?

A. No.”

Ms. Porzio then asked Poey if she could identify the stairway depicted in photographs marked as defendant’s Exhibits “E,” “F” and “G.” Each photograph depicted a stairway located in the vestibule immediately inside the premises and adjacent to the same entrance depicted in Exhibit “D.” Poey did not immediately identify the vestibule stairway as the location of the alleged accident and stated “[j]ust take it easy, just wait a minute.” Shortly thereafter, Poey stated that her accident occurred on the second step from the top of the vestibule stairway depicted in Exhibit “E.” Her testimony with respect to the location of the alleged accident did not change again throughout the rest of her deposition.

Plaintiff thereafter served an Amended Bill of Particulars (“Amended BP”) which specified the vestibule stairway as the location of the alleged accident.

Defendant argues that “Poey’s confusion regarding the location of the accident and her inability to confirm that she even fell on [d]efendant’s steps” at the premises warrants dismissal. Poey contends that summary judgment on this issue is improper because there exists a triable issue of fact with respect to Poey’s identification of the location of the alleged accident. In reply, defendant asserts that it was grossly improper for plaintiff to serve the Amended BP after service of defendant’s motion for summary judgment since disclosure is stayed until determination of the instant motion. CPLR § 3214. Defendant argues that the Amended BP should not be considered by the court and, therefore, plaintiff cannot identify the location of the alleged accident.

As for the alleged defect, Poey stated at her deposition that when she fell on the

set of stairs, she "felt as if something moved." Ms. Porzio inquired further:

"Q. When you say "it moved," what moved?

A. Here, it moved like this (indicating).

Q. Ma'am, I just need you to tell me what it is that moved?

Elder: When you're saying "it moved," what are you referring to?

Poey: This here (indicating).

Q. What are you indicating?

A. I don't understand the question.

Elder: She's asking you to say in words what it is you're pointing to.

A. It's marble, it's marble. When I feel I felt as if something moved.

Elder: When you say "something," what are you referring to?

Poey: This here (indicating).

Elder: Indicating on the photograph the step, Exhibit E.

A. That moved there (indicating)."

Defendant argues that plaintiff's "feeling" is not enough to prove the existence of a defective condition. Further, defendant asserts that based on the affidavit of William Marchand ("Marchand"), the Assistant Vice President for Facility Operations, summary judgment is warranted because the only evidence shows that defendant neither created nor had constructive notice of the claimed defect. Marchand claims that there have been no incidents or complaints about either the steps leading to the entrance or the vestibule stairway. Defendant also states that there is "no documentation concerning previous trip-and-falls or instances of movement of the stairs in question."

Plaintiff contends that the photographs of the vestibule stairway evidence a

defective condition, specifically "a cracked, chipped, and repaired marble stairway." Plaintiff argues that the repairs are indicated by a brown substance applied to the cracks in the steps and that the issue of prior repairs must be resolved by a jury. Plaintiff alternatively argues that if it is determined that no repairs were made, then there is sufficient evidence present to establish constructive notice. Plaintiff also points to a document entitled "General Regulations," as evidence that the defendant routinely inspects the area where the alleged accident took place and, therefore, had constructive notice of the defects.

In reply, defendant asserts that since plaintiff "did not maintain that she fell as a result of cracks or grooves in the stairs, but rather because she felt as if the exterior stairs 'moved,'" photographs of cracks in the stairs are not probative. Defendant also contends that the regulations cited by plaintiff with respect to certain inspection routines are evidence that there is no known defect as the regulations require defendant's employees to walk upon these steps daily.

Discussion

The moving party seeking summary judgment has the initial burden of proving its *prima facie* case. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if the moving party meets its initial burden of proving that it is entitled to summary judgment, as a matter of law, will the burden then shift to the opponent who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). Granting a motion for summary judgment is the functional equivalent of a trial, therefore, it is a drastic remedy that should not be

granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977).

Defendant's alleged inconsistencies between the bill of particulars and plaintiff's deposition testimony are not a *per se* basis to dismiss plaintiff's complaint. Although her testimony is more narrow than her statements in the bill (e.g. she did not testify about debris or clutter on the salon floor), she has consistently attributed her fall to something moving beneath her feet. Compare: Duncan v. Toles, 21 AD3d 984 (2nd dept. 2005); Williams v. Dover Home Improvement, 276 AD2d 626 (2nd dept. 2000). Therefore, this argument, is not a basis to grant defendant's motion.

Moreover, defendant's assertion, that the court should disregard plaintiff's Amended BP in considering the merits of its position, is a red herring. In deciding the summary judgment motion, the court is not necessarily limited to the bill of particulars, but may also rely on plaintiff's sworn testimony given at her deposition. Even if such testimony is at variance with the original bill of particulars, the court will freely allow for the amendment of a bill of particulars, absent prejudice or surprise. Abdelnabi v. New York City Tr. Auth., 273 A.D.2d 114 (1st Dept. 2000).¹

Thus the court decides this motion based not only upon the original bill but also on plaintiff's deposition testimony. A plaintiff in a slip and fall case must establish that the defendant either created the condition that caused the accident or that it had actual

¹ Defendant correctly argues that the Amended BP was improperly interposed, but for the wrong reasons. An Amended BP is a pleading and is not necessarily barred by the stay of discovery while a summary judgment motion is pending. CPLR §§ 3041, 3212. However, as an amendment to a pleading, leave is required. CPLR § 3025; Abdelnabi v. New York City Tr. Auth., supra; Koch v. St. Frances Hosp., 112 A.D.2d 142 (2nd Dept. 1985).

or constructive notice of the dangerous condition. Gordon v. American Museum of Natural History, 67 NY2d 836 (1986). The issue of whether a dangerous or defective condition exists usually depends on the peculiar facts and circumstances of each case and is generally an issue of fact. Trincere v. County of Suffolk, 90 N.Y.2d 976 (1997).

Defendant has not met its burden of proof on its argument that Poey is unable to prove the existence of a dangerous condition because she cannot establish the location of the alleged accident. Defendant's reliance on Poey's deposition testimony is unavailing. Where during her deposition, Poey recanted her initial identification of the situs of her accident and instead identified a different stairway which was still consistent with all prior pleadings, a triable issue of fact exists. A reasonable jury could conclude that Poey can establish the location of her accident. At most, defendant has only established that plaintiff's prior testimony on this point is inconsistent. The inconsistent testimony merely raised issues of credibility, particularly in view of Poey's use of an interpreter at her deposition and possible lack of comprehension of the questions posed. Nova v. K & B Furniture Co., Inc., 262 A.D.2d 243 (1st Dept. 1999).

As for defendant's argument that plaintiff cannot prove the existence of any defect, defendant has also failed to meet its burden. Defendant points to plaintiff's explanation at her deposition of how the accident occurred. Plaintiff's explanation may not have been particularly detailed or articulate, however, it is consistent with the pleadings. In addition, while defendant's witness, Marchand, claims there were no prior incidents or complaints implicating the existence of any structural defect on the steps at the premises, defendant's Exhibits "E" and "F" depict open and obvious structural defects to the steps which are consistent with Poey's testimony. This record shows

that defendant routinely inspected the area where the alleged accident occurred and there is evidence of prior repairs to the cracks in the stairs owned and maintained by defendant. A reasonable jury could conclude that defendant had constructive notice of the cracks in the stairs and that plaintiff slipped on the stairs due to that condition. Thus there is enough evidence for the jury to decide these issues.


Conclusion

Defendant has failed to establish the absence of any triable issue of fact. Even if defendant had met its burden, plaintiff has demonstrated, by admissible evidence, facts which could lead a jury to conclude that the alleged accident took place on defendant's property and that defendant had constructive notice of the alleged defect. Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision on the office of trial support so that it may be scheduled for trial and assigned.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
June 22, 2007

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
JUN 28 2007
COURT OF APPEALS
FOR THE STATE OF NEW YORK