

Kessler v City of New York

2007 NY Slip Op 32474(U)

July 31, 2007

Supreme Court, New York County

Docket Number: 0116146/2002

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

KESSLER, THERESA SARA

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et. al.,
Defendants.

INDEX NO. 116146/02

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL NO. _____

The following papers, numbered 1 to 4 were read on this motion for Summary Judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2, 3, 4

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION

FILED
AUG 10 2007
NEW YORK
COUNTY CLERKS OFFICE

Dated: 7-31-07

[Signature]
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

----- x
THERESA SARA KESSLER

Plaintiff,

Index No. 116146/02

-against-

CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, MANHATTAN AND BRONX SURFACE
TRANSIT OPERATING AUTHORITY, SPRING
SCAFFOLDING, INC., JEFFRIES MORRIS,
INC. AND TROCOM CONSTRUCTION CORP.,

Defendants.
----- x

FILED
AUG 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

DONNA MILLS, J.:

In this action, plaintiff sues for personal injuries sustained when she tripped and fell while exiting a city bus, alleging that her fall was caused in part by a scaffold restricting her access to the sidewalk. Defendant Spring Scaffolding, Inc. (SSI) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as a matter of law as against it. Plaintiff maintains that she was dazed after her injury and has little recollection of what precipitated her fall or where the incident occurred (see, Affidavit of Theresa Sara Kessler, dated March 24, 2007, annexed to the Affirmation in Opposition of Peter P. Ferraiuolo, Ex A).

Plaintiff Theresa Sara Kessler allegedly sustained injuries on June 21, 2001 at approximately 4:00 p.m. when while exiting the M6 bus, she was allegedly caused to trip and fall on a defective condition (see, Verified Complaint dated July 14, 2002, annexed to defendant's motion for Summary Judgment, Ex A). Plaintiff commenced this action on July 19, 2002.

Relying upon plaintiff's own deposition for its support, among others, defendant now moves for summary judgment, asserting that plaintiff's testimony clearly reveals that SSI is not liable since plaintiff cannot identify the cause or location of the accident. Specifically, Kessler testified that after exiting the M6 bus, which travels up Sixth Avenue, she tripped on a defect on the street/sidewalk which caused her to be propelled forward and hit her head on a rung of scaffolding (Deposition of Theresa Sara Kessler, dated February 4, 2004, annexed to Notice of Motion for Summary Judgment, Ex E). However, when specifically asked to specify the exact defect that caused her injury, plaintiff concedes that at no point after the accident occurred, on the date of the accident, did she actually observe the condition that she tripped on (*id*). Rather, plaintiff averred that after the accident, she merely "took in the area" and "saw the street" (*id.*). Even after plaintiff returned with her husband in August, two months after the accident occurred, she was unable to describe the specific condition that caused her to trip; rather she explained "all I can tell you is how it - my foot felt, when I tripped" (*id*) . Nor was the "buff" colored scaffolding that plaintiff identified in her deposition (*id.*) consistent with the silver and green scaffolding that SSI maintained that it used at that time (Deposition of Kevin Corno, SSI's Operations Manager, annexed to the Motion for Summary Judgment as Ex F).

Also, plaintiff clearly could not find the location of her fall; rather she simply relies upon the fact that her husband took "some pictures" and that there was an "indentation" and some "marks on that area" (Kessler Deposition). In addition, plaintiff further testified that she exited the bus through the front door, in the middle of the block on 6th Avenue between 56th and 57th Street, an area that, according to plaintiff, did not appear to be a

designated bus stop (Kessler Deposition, dated October 11, 2001, annexed to Motion for Summary Judgment as Ex D). Notably, according to Michael Girdwood, the resident manager of 60 West 57th Street, New York, N.Y., a building that spans the entire block, there was no scaffolding on 6th Avenue between 56th and 57th Street but rather, the scaffolding was located one block over on 6th between 57th and 59th (Deposition of Michael Girdwood, annexed to the Notice of Motion for Summary Judgment). Girdwood maintains that he has photos of the area on the day in question (*id.*).

In order to establish a *prima facie* case of negligence in a slip and fall case, the plaintiff must present proof that the defendants either created, or had actual or constructive notice of the defective condition which allegedly caused her to fall (*Robinson v Lupo*, 261 AD2d 525 [2nd Dept 1999]). Moreover, to constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*id.*).

Defendant SSI has demonstrated *prima facie* entitlement to summary judgment as a matter of law through the deposition testimony of plaintiff in that she was not able to identify the cause of her fall (*Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006]). "While plaintiff's evidence need not positively exclude every possible cause of [her] fall other than the alleged [indentation], it must be sufficient to permit a finding of proximate cause based upon logical inferences, not speculation (*id.* at 320). Moreover, SSI presented evidence that the scaffolding that plaintiff identified as the scaffolding on which she hit her head was not erected by SSI.

In opposition, plaintiff failed to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of

fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). No reasonable inferences as to causation can be drawn from the self-serving affidavit of plaintiff, whose surmise as to causation is insufficient to create an issue of fact warranting trial (*Thomas v Our Lady of Mercy Medical Center*, 289 AD2d 37 [1st Dept 2001]). "Since it is just as likely that the accident could have been caused by some other factor," any determination by the trier of fact as to the placement of the scaffold being a cause of the accident "would be based upon sheer speculation" (*Manning v 6638 18th Avenue Realty Corp.*, 28 AD3d 434, 435 [2nd Dept 2006] [citations omitted]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant Spring Scaffolding Inc.,, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 7-31-07

FILED

AUG 10 2007

ENTER: NEW YORK
COUNTY CLERK'S OFFICE

D. Mills

J.S.C.

DONNA M. MILLS, J.S.C.