[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 115555/2001
MCCANN, PETER
vs
PIEL, MARK
Sequence Number : 004
SUMMARY JUDGEMENT

INDEX NO. 115555/01

MOTION DATE 9/7/07

MOTION SEQ. NO.

MOTION CAL. NO.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED SEP 17 2007 COUNTY CLERK'S OFFICE

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendants Mark Piel, Daniel Piel a/k/a Daniel Deutmeyer Piel and Susan Piel, Individually and as Trustees of the Daniel Piel Revocable Trust dtd August 28, 1998, "John Doe #1," "Jane Doe #1," "Richard Roe #1," the last three names being fictitious persons or entities with given and/or surnames unknown to the plaintiff, who owned and/or leased 276 West 11th Street, New York, and 276 W. 11 St. Partnership, for an order pursuant to CPLR 3212, granting summary judgment in favor of the defendants, dismissing the complaint of plaintiff Peter McCann, is granted. It is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly. It is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 9/11/07

HON. CAROL EDMEAD

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ DO NOT POST ☐ REFERENCE

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 35

PETER McCANN,

Plaintiff,

-against-

MARK PIEL, DANIEL PIEL a/k/a DANIEL DETTMERS PIEL and SUSAN PIEL, Individually and as Trustees of the DANIEL PIEL REVOCABLE TRUST dtd AUGUST 28, 1998, "JOHN DOE #1," "JANE DOE #1," "RICHARD ROE #1," the last three names being fictitious persons or entities with given and/or surnames unknown to the plaintiff, who owned and/or leased 276 WEST 11th STREET, NEW YORK and 276 W. 11 St. PARTNERSHIP,

Defendants.

Index No. 115555/01

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Mark Piel, Daniel Piel a/k/a Daniel Dettmers Piel and Susan Piel, Individually and as Trustees of the Daniel Piel Revocable Trust dtd August 28, 1998, "John Doe #1," "Jane Doe #1," "Richard Roe #1," the last three names being fictitious persons or entities with given and/or surnames unknown to the plaintiff, who owned and/or leased 276 West 11th Street, New York, and 276 W. 11 St. Partnership (collectively "defendants"), move for an order pursuant to CPLR 3212, granting summary judgment in favor of the defendants, dismissing the complaint of plaintiff Peter McCann ("plaintiff").

This action was filed to recover damages for bodily injuries allegedly sustained by plaintiff on August 18, 1998 at about 9:15 a.m. Plaintiff claims that he accidently leaned against a gate in a wrought-iron fence located in front of the building owned by the defendants at 278

West 11th Street, New York (the "subject premises"). When he leaned against the gate, it opened causing him to fall into the space behind the gate sustaining his injuries. The fence enclosed an area planted with bushes and ivy. The planted area is separated from the sidewalk by a brick wall. The gate swings inward allowing direct access to the basement entrance where plaintiff had installed a drain pipe.

Plaintiff's Deposition Testimony

Plaintiff had been doing work for Mark Piel at the subject premises for about eight years, and odd jobs for him for quite a few years before (p. 21). Defendants used plaintiff and other plumbers to do work at the subject premises. Defendants would call plaintiff up and advise him if they had a job for him to do (p. 24). On the date of plaintiff's accident, he was at the subject premises to meet an inspector from the Buildings Department (p. 25). A new sewer line had been installed and it was being inspected (p. 26). The inspector was to look at the new house trap inside the cellar of the house (pp. 26-27). In April of 1998, before plaintiff's accident, he installed a vent pipe at the subject premises. He had to go through the fence/gate not more than twice, in order to perform the work of putting in the vent pipe (pp. 35-37). Plaintiff does not recall if there were any defects in the gate at the time he was doing the work in April of 1998 (p. 38).

Prior to the date of plaintiff's accident he complained to Mark Piel that it was all overgrown in the area where plaintiff had to work, and was next to impossible to get through there, and branches of some saplings or trees and weeds were all going through the area and it was not easy to get in and out of there. The gate was not opening or closing; plaintiff could not open it because of the debris and the overgrowth of the saplings, or whatever vegetation was in

there (pp. 42-43). He told Mark Piel that the gate was "defective" because of the condition of the vegetation and the saplings that were inside (p. 43).

On the date of plaintiff's accident, it was not necessary for him to go into the area behind the gate (p. 47). At the time of plaintiff's accident, he was leaning against the gate; he accidentally moved against the gate, and the gate went back. His back was toward the gate and he leaned back just for a split second or so and the gate flew open, and he fell. As he was falling back, he reached out and caught hold of the spike and the spike went through his hand. He then fell into the "weeds and stuff" (pp. 53-55).

Plaintiff never used the fence/gate between April when he was doing repair work, and the date of his accident (p. 57).

Mark Piel's Deposition Testimony

Defendants never did any work on the fence or gate, and never authorized any work to be done on the fence or gate (p. 25). Defendants had a superintendent for the building, Guillermo Resto, who took out the trash three times a week, vacuumed the hall and changed the bulbs, and looked after the sidewalk (p. 31). Piel never had a conversation with plaintiff about the latch (p. 81).

Deposition of Guillermo Resto

Resto worked for defendants as a superintendent from 1998 until 2001 (p. 5). He never did any work in the garden area. He did not even go to that area (p. 10). He never did any repairs to the fence at any time while working at the subject premises (p. 16).

Defendants' Contentions

Discovery has not shown that the defendants were notified or had any notice of any alleged defect in the gate's latch, nor was there any evidence that defendants had a general awareness that a dangerous condition potentially existed at the time and place of the incidents. Discovery did establish that the defendants never created any defective condition to the latch nor did they possess actual or constructive notice for such a period of time that it was broken and it should have been repaired.

Moreover, any complaints by plaintiff were solely related to the difficulties he claims existed in opening and closing the gate, because of the overgrown ivy and debris behind the gate. Plaintiff did not inform Mark Piel that the latch was defective, but only that he had problems in opening and closing the gate.

The defendant Mark Piel and the superintendent both definitely testified that they never were notified if the latch was broken or needed to be repaired. In any event, the report, if made, was at least a year before the accident when the meter was repaired. Moreover, plaintiff's complaint only related to difficulties in opening and closing the gate because of the vegetation behind the gate. There was no report or complaint that the latch was defective.

The court would be required to speculate as to what was the proximate cause of the incident especially in the absence of any proof that the latch was defective in some manner.

Plaintiff's Contentions

Plaintiff first argues that the motion should be denied because there is no affidavit from a person having personal knowledge of the facts which recites all material facts that the cause of action lacks merit.

Next, plaintiff argues that the motion should be denied because the pleadings were not annexed to the moving papers.[1]

Defendants have not established that the gate latch was reasonably safe. Nor have defendants established that the gate was reasonably safe, or that the gate locking mechanism was reasonably safe.

Defendants did not submit an affidavit from an expert.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff

[1] The court notes that the pleadings were annexed to the moving papers, including the Summons, Complaint and Bill of Particulars.

would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

As to plaintiff's argument that the motion should be denied because there is no affidavit from a person having personal knowledge of the facts which recites all material facts that the cause of action lacks merit, a party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]), including depositions.

Further, as to plaintiff's argument that the motion should be denied because the defendants failed to submit an expert affidavit, the rule requiring an expert's affidavit to establish merit applies to any case in which "plaintiffs' claims are not based on matters within the 'ordinary experience and knowledge of laymen' " (*Rasmussen v Niagara Mohawk Power Corp.*, 294 A.D.2d 862, 862, 740 N.Y.S.2d 912). The instant matter is not one requiring an expert affidavit in order to establish entitlement to summary judgment.

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d 251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

In the instant action, the Complaint and the Bill of Particulars articulate the claim that: "[T]he gate latch at 276 West 11th Street,...did not lock. The gate latch....was unlocked. There was no lock on the latch." And, the claim is that the fence was defective and was a dangerous condition. However, there is no evidence that the defendants were notified or had any notice of any alleged defect in the gate, the gate's latch, the locking mechanism, or fence. There is no

evidence to establish that the defendants created any defective condition to the gate, the gate's latch, the locking mechanism and/or fence, or that defendants possessed actual or constructive notice for such a period of time that the gate, the gate latch, the locking mechanism and/or fence was broken and it should have been repaired. Plaintiff's proof of prior notice to defendants of a defective condition relates solely to the difficulties he claims existed in opening and closing the gate, *because of* the overgrown ivy and debris behind the gate. Plaintiff did not inform Mr. Piel that the latch was defective, but only that he had problems in opening and closing the gate resulting from debris and the overgrown condition of the area.

Conclusion

The court finds that defendants have established that landlord did not have actual or constructive notice of the condition alleged in plaintiff's Complaint and/or Bill of Particulars, or that there was any such notice for such a period of time that, in the exercise of reasonable care, it should have been corrected. In fact, there is no evidence at all that defendants had any notice of a defective condition related to plaintiff's accident. Based on the foregoing, it is hereby

ORDERED that the motion of defendants Mark Piel, Daniel Piel a/k/a Daniel Dettmers Piel and Susan Piel, individually and as Trustees of the Daniel Piel Revocable Trust dtd August 28, 1998, "John Doe #1," "Jane Doe #1," "Richard Roe #1," the last three names being fictitious persons or entities with given and/or surnames unknown to the plaintiff, who owned and/or leased 276 West 11th Street, New York, and 276 W. 11 St. Partnership, for an order pursuant to CPLR 3212, granting summary judgment in favor of the defendants, dismissing the complaint of plaintiff Peter McCann, is granted. It is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly. It is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: September 11, 2007

Carol Robinson Edmead, J.S.C.