

Miller v Second Canaan Hous. Dev. Fund Corp.
2007 NY Slip Op 32934(U)
September 11, 2007
Supreme Court, New York County
Docket Number: 0105019/2005
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PART 17

Index Number : 105019/2005

MILLER, LAKESHA

vs

SECOND CANAAN

Sequence Number : 002

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 *is decided*

as attached

FILED
SEP 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/11/07

[Signature]
EMILY JANE GOODMAN 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 17

-----X
LAKESHA MILLER,

Plaintiff,

-against-

Index No.: 105019/05

SECOND CANAAN HOUSING DEVELOPMENT
FUND CORPORATION, and WEST HARLEM
GROUP ASSISTANT INC.,

Defendants.
-----X

EMILY JANE GOODMAN, J.S.C.:

This is an action for personal injuries sustained by the plaintiff, Lakesha Miller, as a result of a trip and fall on an interior staircase. Plaintiff alleges that she tripped and fell on the fourth step from the top as a result of an alleged defect in the staircase. Defendants move for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the ground that the alleged defect is too trivial to be actionable.

On September 14, 2004, plaintiff was using the interior staircase at 2360 8th Avenue, a four-story residential building in which there is no elevator, going down from the fourth floor to the third floor. When she stepped onto the fourth step down, she stepped into what she described at her deposition as "a hole or depression" (Miller EBT at p. 30), and went tumbling down the stairs, backwards, landing on her rear (*id.*, at pp. 30-31).

Defendants contend that summary judgment is warranted in their favor based on plaintiff's own photographs which allegedly depict the depressions in the step to be of minimal size and depth, combined with plaintiff's deposition testimony that the condition of the step in the photographs was even worse than on the date of the accident.

The proponent of a summary judgment motion has the initial burden of establishing, by evidentiary proof in admissible form, the cause of action or defense sufficiently to warrant the court as a matter of law to direct judgment in their favor. CPLR 3212; GTF Marketing, Inc. v Colonial Aluminum Sales, Inc., 66 NY2d 965, 967 (1985); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). "The failure to make such a prima facie showing requires a denial of the motion regardless of the sufficiency of the opposed papers" Ayotte v Gervasio, 81 NY2d 1062, 1063 (1993), quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see also JMD Holding Corp. v Congress Financial Corp., 4 NY3d 373, 384 (2005); In re Kasziner, 298 AD2d 109 (1st Dept 2002).

Generally, the issue of whether a dangerous or defective condition exists depends on the particular circumstances of each case, and is properly a question of fact for the jury. Trincere v County of Suffolk, 90 NY2d 976, 977 (1997); Corrado v City of New York, 6 AD3d 380, 380-81 (2d Dept 2004); Argenio v Metropolitan Transp. Auth., 277 AD2d 165, 165-66 (1st Dept 2000); Riser v New York City Hous. Auth., 260 AD2d 564 (2d Dept 1999). "However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip." Hargrove v Baltic Estates, 278 AD2d 278 (2d Dept 2000); see also Hagood v City of New York, 13 AD3d 413 (2d Dept 2004). In determining whether a defect is trivial, a court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury." Trincere v County of Suffolk, *supra* at 978, quoting Caldwell v Village of Island Park, 304 NY 268, 274 (1957); see also Murray v City of New York, 15 AD3d 636, 637 (2d Dept 2005).

Summary judgment must be denied because there is no competent evidence before the court conclusively establishing the size and depth of the depressions at issue. While defendants offer photographs allegedly taken by someone in plaintiff's attorney's office (Miller EBT at pp. 32-34), defendants fail to establish when these photographs were taken or who made the handwritten notations thereon. Nor do the photographs contain any exhibit labels such that the court can correlate them with any of the deposition testimony in this case for purposes of authentication. Even if the court were to consider these photographs as competent evidence, it is not at all clear that they show a defect in the fourth step that "is less than an inch across and of no discernable depth," as defense counsel contends. The top photograph on page 2 of Exhibit E to the Szemer Affirmation shows two depressions in the step and the tape measure depicted is measuring only a portion of the smaller depression. In addition, while the pen in the lower photograph on the same page "depicts the same area as having a depth that is barely the tip of a plastic pen," (Szemer Affirm. ¶ 6), there is nothing in the record establishing that this was the deepest part of this depression or that the apparently larger depression to the right was not deeper.

Defendants also contend that summary judgment is warranted because plaintiff testified that the condition of the staircase as depicted in the photographs is actually worse than on the day of the accident. However, plaintiff merely testified that the condition of the staircase as depicted in one of the photographs, marked as Defs. Exh. B, is "pretty much" the same as on the date of the accident, but is getting worse as time progresses. Plaintiff also clearly testified that one of the photographs, marked as Defs. Exh. A, shows the fourth step of the staircase in question and unequivocally answered "Yes" to the question of whether it depicts the step to be in the same

condition as on the date of the accident.

Even assuming that defendants met their prima facie case, in opposition to defendants' motion, plaintiff offers an affidavit from her expert witness, a professional engineer, who avers that he inspected the staircase approximately three months after the accident and that he observed that the depressed and deteriorated areas of the tread of the fourth step was 5/8" deep and approximately 17 inches over from the right edge of the step. He concluded that "the subject stairway was extremely dangerous and hazardous in that the step surface . . . had a deteriorated, depressed and eroded area creating an imbalance for anyone using this part of the tread surface, and that the position of the hazard, in the area where one would ordinarily place the ball of their foot when using the stairs, constituted a trap-like condition for tenants or visitors to the building." Fein Aff. at p. 2.

Plaintiff also submits the deposition testimony of the property manager, Anne Rodriguez, who testified that the condition of the fourth step was something that she would have wanted to be made aware of for safety reasons, and had she paid attention to this condition on her monthly visits to the building, she would have taken certain steps to make sure it was repaired. Rodriguez EBT at pp. 62-64.

Defendants argue that even accepting the conclusions of plaintiff's expert regarding the depth of the depressions, this case must be dismissed as the facts are identical to the case of Gaud v Markham (307 AD2d 845 [1st Dept 2003]), where a defect on an exterior concrete staircase landing less than an inch deep was found to be de minimis. Indeed, defendants contend that recent First Department case law establishes that a defect of less than one inch, even if on a staircase, is not actionable because it is trivial as a matter of law. Quite to the contrary, it is well

settled that "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable." Trincere, 90 NY2d at 977; see also Argenio v Metropolitan Transp. Auth., 277 AD2d at 166 ("[t]here is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner..."). And the cases on which defendants rely are all factually distinguishable.

In Gaud v Markham, 307 AD2d 845, supra, a mail carrier lost her footing on a concrete stairway landing at the entrance to the defendant's building. The defective area was "substantially less than an inch deep, and covered an area approximately one foot long and four or five inches across." Id. The Appellate Division, in reversing the trial court, ruled that this height differential of less than one inch was trivial as a matter of law, specifically taking into account its location. Here, in contrast, the location of the defect is substantially different. Rather than being located on a staircase landing, the defect is located near the edge of a step in the upper-middle portion of a staircase with the potential for causing a person to fall down the stairs. In addition, in contrast to the Gaud case, the defendants' representative herself testified that the condition of the fourth step was something that she would have wanted to be made aware of for safety reasons. Thus, the location of the defect renders it substantially more dangerous than the defective landing in the Gaud case, and the question of whether the defendant was negligent in not repairing this step prior to the plaintiff's fall should go to a jury.

Defendant also relies on Santiago v United Artists Communication, Inc., 263 AD2d 407 [1st Dept 1999]), in which the First Department again reversed the trial court finding that a "depression of ½ inch which appeared to be shallow and gradual according to the plaintiff's expert and photographic evidence" warranted a finding that no dangerous or defective condition

existed as a matter of law. Id. at 408. Here, in contrast, there is no evidence before the court of whether the depressions on the fourth step were “shallow or gradual” as opposed to containing a sharp edge which might pose a tripping hazard and the plaintiff’s expert describes the depressions as creating a dangerous imbalance in area where one would step with the ball of the foot while descending the stairs. Likewise, in Figueroa v Haven Plaza Dev. Fund Co., Inc., 247 AD2d 210 [1st Dept 1998]), the shallow, gradual character of the depression was readily apparent from the plaintiff’s photographs. The case is further distinguishable because the defect was located in a walkway, not on a flight of steps.

Finally, in Garcia v Jesuits of Fordham, Inc., 6 AD3d 163 [1st Dept 2004]), the plaintiff testified at her deposition that she did not see what caused her to fall on an interior staircase and the court discounted the affidavit of her expert because his inspection was conducted years after the accident and there was no evidence connecting the defects cited in his affidavit with the plaintiff’s fall. Here, in contrast, plaintiff testified that she stepped into a hole or depression on the fourth step of the staircase, causing her fall, and plaintiff’s expert inspected the area within three months of the accident.

For the foregoing reasons, it is hereby

ORDERED that defendants’ motion for summary judgment dismissing the complaint is denied.

This Constitutes the Decision and Order of the Court.

Dated: September 11, 2007

ENTER:


EMILY JANE GOODMAN

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