

Rodriguez v New York City Tr. Auth.

2007 NY Slip Op 33732(U)

November 15, 2007

Supreme Court, New York County

Docket Number: 0114925/2004

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

RODRIGUEZ, ROSA MARIA

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY,
Defendant.

INDEX NO. 114925/04

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to 3 were read on this motion for _____.

PAPERS NUMBERED

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

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: _____ YES NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
NOV 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-15-07

D. Mills
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
ROSA MARIA RODRIGUEZ,

Plaintiff,

-against-

Index No. 114925/04

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

-----X

FILED
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DONNA MILLS, J.:

The defendant New York City Transit Authority (NYCTA) moves, pursuant to CPLR 3211 and 3212, for an order granting summary judgment dismissing the complaint.

This is an action to recover damages for personal injuries suffered by the plaintiff Rosa Maria Rodrigues (Rodriguez) in a slip and fall accident caused by debris on a NYCTA stairway. In support of the motion, the NYCTA submits the cleaning schedule for the subject stairs, and argues that there is no evidence that it had notice of the condition. In opposition to the motion, the plaintiff Rodriguez argues that the NYCTA fails to meet its initial burden on its motion, and that there was both actual and constructive notice of the condition. In reply, the defendant NYCTA argues that the plaintiff Rodriguez, as a matter of law, cannot establish notice.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065

[1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

The NYCTA, as the owner of the subject stairs, owed a duty of reasonable care to keep the stairway safe (Tagle v Jacob, 97 NY2d 165, 168 [2001]). To establish a prima facie of negligence in a slip and fall case, the plaintiff must prove that the defendant either created the condition which caused the accident, or had actual or constructive notice of the condition and a reasonable time to correct it or warn about its existence (Luciani v Waldbaum, Inc., 304 AD2d 537 (2d Dept 2003)). However, in order to succeed on a motion for summary judgment, a defendant is required to establish prima facie that it neither created, nor had actual or constructive notice of the allegedly dangerous condition (Pomerantz v Culinary Institute of America, 2 AD3d 821 [2d Dept 2003]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time before the accident to permit the defendant or its employees to discover and remedy it (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]). On a motion for summary judgment to dismiss the complaint based upon lack of constructive notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of such notice as a matter of law (Librandi v Stop & Shop Food Stores, Inc., 7 AD3d 679, 679-680 [2d Dept 2004]).

The NYCTA fails to meet its initial burden of establishing, *inter alia*, that the allegedly dangerous condition was not visible and apparent or that it had not existed for a sufficient length of

time before the accident to permit the NYCTA to discover and remedy it (Fuller v Ryder Truck Rental, Inc., 34 AD3d 1325 [4th Dept 2006]). Furthermore, evidence that on the date of the accident the stairs were littered with debris and trash raises issues of fact as to the reasonableness of the NYCTA's frequency of inspecting and cleaning the stairway in a heavily traveled area, and whether the visible debris existed for a sufficient time prior to the accident to place the NYCTA on constructive notice.

The NYCTA cleaner did not testify about his activities on the date in question. The NYCTA offers no testimony from its employees working that day who, presumably, could have offered testimony regarding the last time the stairway was checked prior to the accident (Porco v Marshalls Department Stores, 30 AD3d 284 [1st Dept 2006]; Britto v Great Atl. & Pac. Tea Co., Inc., 21 AD3d 436, 437 [2d Dept 2005]). The testimony regarding general maintenance procedures failed to provide sufficient detail regarding the last time the stairs were checked prior to the accident or about the cleaners' activities on the day of the accident.

Accordingly, it is

ORDERED that the motion is denied.

Dated: 11-15-07

ENTER:

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NOV 20 2007
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COUNTY CLERK'S OFFICE



J.S.C.

DONNA M. MILLS, J.S.C.