

Andrews v We're Assoc., Inc.

2008 NY Slip Op 31339(U)

April 30, 2008

Supreme Court, Nassau County

Docket Number: 8435-03/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

CAROL ANDREWS and EDWARD ANDREWS,

Plaintiffs,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.:18435/03
Motion Seq. Nos.: 02 & 03**

WE'RE ASSOCIATES, INC., WE'RE ASSOCIATES
COMPANY, WE'RE ASSOCIATES II, WE'RE
DEVELOPING COMPANY, THE WE'RE GROUP,

Defendants.

DECISION AND ORDER

-----X

WE'RE ASSOCIATES COMPANY,

Third-Party Plaintiff,

-against-

PROHEALTH CORP. and DAVID COOPER and MILTON
COOPER, as GUARANTORS,

Third-Party Defendants.

-----X

Papers Read on this Motion:

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In Motion Sequence number two (2), Third-Party Defendant, ProHealth Corp., moves for an Order pursuant to CPLR §3212, dismissing the third party complaint against them.

In Motion Sequence number three (3), Defendant/Third Party Plaintiff, We're Associates Company, moves for an Order pursuant to CPLR §3212, granting them Summary Judgment and

dismissing the complaint of the Plaintiffs, Carol and Edward Andrews:

This is an action for personal injuries sustained by the Plaintiff, Carol Andrews, as a result of a trip and fall in the entranceway at 2 Pro Health Plaza, Lake Success, New York on December 21, 2000. The Defendant/Third-Party Plaintiff, We're Associates Company, managed the property (*Motion*, Ex. B, ¶3) and leased it to Third Party Defendant, ProHealth Corp., pursuant to a lease agreement dated March 6, 1998 (*Id.*, Ex. M). Plaintiff claims that she was caused to trip and fall due to the negligence of the Defendants, We're Associates Company; specifically, she claims in her Bill of Particulars that when she was entering the lobby of the subject premises, she was caused to fall "...when the heal [sic] of her shoe became caught in the door saddle..." (*Bill of Particulars*, ¶3). She alleges that the vestibule doorway was "raised, worn, cracked and uneven." She claims that, among other things, the area should have had warning signs, flares, guards, lights and signals to protect her from this dangerous vestibule. In her Bill of Particulars, she claims both actual and constructive notice, as well as statutory violations including the New York State Building Construction Code. Plaintiff, Edward Andrews, seeks to recover for loss of services.

At the time of her accident, Plaintiff was in the employ of the third party Defendant, ProHealth. She was a registered nurse working as an office manager. She believed that she started work in July of 2000. She testified that prior to December 2000, she had traversed the subject entranceway on many occasions without encountering any problems.

She claims that at the time of her accident, she was wearing pumps with a heel of approximately 1-1/2 to 2 inches. She stated that she walked through the first set of doors in the entranceway closest to 2800 Marcus Avenue, without incident, but that "[t]here is another door that you have to come through. And that's when the area that [her] heel caught in the metal threshold." It was Plaintiff's left shoe that got caught in the metal threshold. At that time, her right foot had already passed over the metal threshold.

ProHealth occupied the premises pursuant to a lease agreement with We're Associates

Company. At the time of Plaintiff's accident, ProHealth was the only tenant in the building.

There is no evidence on this record that there were any complaints regarding the entranceway to the subject premises including the doorways and door saddles. At no time prior to December 21, 2000 was ProHealth made aware of any accidents whereby anyone allegedly tripped and fell as a result of a door saddle at any of the entranceways to the subject premises.

It is noted at the outset that Defendant/Third-Party Plaintiff, We're Associates, voluntarily discontinued, by stipulation dated October 13, 2006 and filed October 27, 2006, its claims against the third-party individual Defendants, David and Milton Cooper as guarantors of the Third-Party Defendant, ProHealth (CPLR §3217[a][2]; *Motion*, Ex. H).

The standards for Summary Judgment are well settled. A court may grant Summary Judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a Summary Judgment motion, a Court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v Prospect Hosp.*, *supra*).

However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id.*). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) even if alleged by an expert (*Alvarez v Prospect Hospital*, *supra*; *Aghabi v Sebro*, 256 AD2d 287 [2d Dept

1998]).

In moving for Summary Judgment, Defendant, We're Associates, submits, *inter alia*, that the doorway saddle did not constitute a dangerous or defective condition and that any defect to the doorway saddle would be trivial and open and obvious condition.

Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Taussig v Luxury Cars of Smithtown, Inc.*, 31 AD3d 533 [2d Dept 2006]). However, a property owner may not be held liable for trivial defects, not constituting a trap or a nuisance, over which a person might merely stumble, stub his or her toes, or trip (*Taussig v Luxury Cars of Smithtown, Inc.*, supra). In determining whether a defect is trivial, the 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; *Taussig v Luxury Cars of Smithtown, Inc.*, supra). Here, in support of their motion, Defendants have made a prima facie showing that the alleged dangerous and defective condition of the saddle is too trivial to be actionable (*Trincere v County of Suffolk*, supra at 978; *Taussig v Luxury Cars of Smithtown, Inc.*, supra). To the extent that the door saddle can even be considered a nuisance, this Court finds that, based upon the record herein, including photos of the subject doorway saddle and the subject entranceway, and keeping in mind the other relevant circumstances of the action including that Plaintiff had traversed the entranceway on countless occasions before her accident without complaint and that it was a clear morning, a prima facie showing has been made that the alleged defect was, in fact, too trivial to be actionable.

In opposing Defendant's motion for summary judgment, Plaintiffs, Carol and Edward Andrews, submit colored photographs, an unsworn report by Leonard H. Lustbader dated July 13, 2000 relating to an inspection he performed on June 19, 2001, the oral examination before trial transcripts of Carol Andrews and of Robert Bloom. Notably, Plaintiff fails to submit her own

affidavit in opposition to Defendants' motion for summary judgment.

Plaintiffs' reliance upon the affirmation of their attorney, who is clearly without personal knowledge of the facts, does not supply the evidentiary showing necessary to successfully defeat Defendants' motion for summary judgment (CPLR §3212 [b]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 229 [1978]). An affirmation of counsel is of no evidentiary value or effect (*Roche v Hearst Corp.*, 53 NY2d 767 [1981]; *Columbia Ribbon & Carton Mfg. Co. v A-1-A Corp.*, 42 NY2d 496 [1977]).

To the extent that the report of Leonard Lustbader, an accident analyst and forensic engineer is not in admissible form, it cannot be considered by this Court (*Grasso v Angerami*, 79 NY2d 813 [1991]). Additionally, his report also pre-dates the accident and thus presents a fatal evidentiary flaw in opposition to Defendants' prima facie showing of entitlement to judgment as a matter of law.

Counsel for Plaintiff, relying upon the report of Mr. Lustbader, asserts that the issue of whether the shape and nature of the defect, "with its projecting leading edge on top of an elevation" represents a trap or a snare is a question of fact requiring a trial (*Aff in Opp.*, ¶13). Plaintiff's counsel also maintains that there is a material question of fact as to whether or not a mat was installed between the first and second sets of door on the day of the accident. This argument that there may have been a necessary mat that was missing between the two doors is raised as a new theory of liability for the first time in opposition to the Defendants' motion. "While modern practice permits a Plaintiff to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by the Plaintiff's submissions" (*Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 524 [2d Dept 2005]; *Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 280 [1978]; *Medina v Sears, Roebuck & Co.*, 41 AD3d 798, 799-800 [2d Dept 2007]), here, the Plaintiff's protracted delay in presenting the new theory of liability entitles this Court to reject the argument entirely (*Medina v Sears, Roebuck & Co.*, supra at

799-800; *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, supra at 524).

Plaintiff clearly and consistently identified the door saddle and the metal threshold as the cause of her trip and fall (*Bill of Particulars*, ¶3; *Andrews Tr.*, p. 84). Moreover, based upon a simple and plain reading of her Bill of Particulars, the purpose of which is to amplify the pleadings (*Castleton v Broadway Mall Properties, Inc.*, 41 AD3d 410 [2d Dept 2007]), it is clear that at no point did Plaintiff even hint at the absence of a mat as a cause of her accident.

Thus, in response to Defendant, We're Associates Company's prima facie showing, Plaintiffs' Carol and Edward Andrews' submissions are insufficient to create a triable issue of fact and thus, Defendant, We're Associates Company's motion is **granted** and Plaintiffs' complaint as against it is herewith dismissed (*Lorenz Diversified Corp. v Falk*, 44 AD3d 910 [2d Dept 2007]; *Takeuchi v Silberman*, 41 AD3d 336 [1st Dept 2007]).

Under these circumstances, Third-Party Defendant, ProHealth Corp.'s motion, for an Order dismissing the third party complaint as against it is **denied as moot**.

This shall constitute the Decision and Order of this Court.

DATED: April 30, 2008
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD

ENTERED
MAY 05 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE