

Bernard v New York City Tr. Auth.

2008 NY Slip Op 31641(U)

June 6, 2008

Supreme Court, Queens County

Docket Number: 0027587/2005

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 22

JOANNE WATTS BERNARD,
Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
Defendant.

Index No. 27587/05

Motion
Date April 22, 2008

Motion
Cal. No. 3

Motion
Sequence No. 2

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Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendant, New York City Transit Authority ("NYCTA") moves for summary judgment on the issue of liability and dismissal of plaintiff, Joanne Watts Bernard Complaint pursuant to CPLR 3212, arguing that the subject stairway, was not defective, nor did it constitute a dangerous condition, that the defendant had no notice of any dangerous or defective condition, and that the condition alleged by plaintiff to have caused her fall is not actionable as a matter of law.

On March 25, 2005 at about 8:15 a.m., plaintiff was allegedly injured after she tripped and fell on a "P-12" stairway at the Hillside Avenue and 179th Street subway station, Queens County, City and State of New York. Plaintiff asserts in her Notice of Claim that the staircase and staircase area that she tripped on was "obstructed, slippery, uneven, raised, depressed and/or deteriorated." She testified at her examination before trial that she fell due to a protruding steel plate on the first step. Plaintiff maintains that as a result of the negligence of the defendant, she sustained severe and permanent injuries.

Summary judgment is a drastic remedy and will not be granted

if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against. (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (see *id.*).

Defendant established its *prima facie* entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). Defendant argues that it cannot be held liable for plaintiff's injuries since: the subject stair rail base plate was not defective and it did not constitute a dangerous condition; since the defendant had no notice of any dangerous or defective condition; and since the condition alleged by plaintiff is not dangerous, defective, or actionable as a matter of law. In support of its motion, defendant provides, *inter alia*, the affidavit of Salvatore Fiore who affirms that he is currently employed by the NYCTA as a records searcher and affirms that he is qualified to review maintenance/repair records for the NYCTA subway system and to interpret their content. Mr. Fiore affirms that he conducted a complete search of all maintenance/repair records maintained by the NYCTA for the 179th Street subway station for the period from March 2, 2003 through and including March 25, 2005, and then reviewed the search Report. He concludes that: "[d]uring the period searched, the Report does not reveal any indication of any complaint, maintenance problem, maintenance or repair request, or any maintenance or repair issue with respect to the stair rail or

stair rail base plate at the 'P-12' stairway." He further concludes that based on the records there is no indication that the NYCTA had notice of any defective condition or that there was any defective condition regarding the stair rail or stair rail base plate/fastening bolts located at the first step down of the "P-12" stairway. Finally, Mr. Salvatore states that he reviewed a photograph of the accident scene provided by the plaintiff, and it does not appear to demonstrate any defective condition. Additionally, in support of the motion, defendant presents the affidavit of Carmelite Cadet, PE, who states that she is currently employed as a New York State Licensed Professional Engineer for the NYCTA. She affirms that as part of her duties, she inspects subway station facilities to ensure that they are constructed and maintained in accordance with the NYCTA's construction standards and related guidelines. She further affirms that she conducted an in-person inspection of the subject station, and she determined that the stair rail base plate and fastening bolts are properly constructed, maintained, and are in compliance with all applicable NYCTA construction guidelines, as well as with the New York City Building Code. She also states that she reviewed the photographs supplied by plaintiff and that the stair rail and base plate were in the same condition at the time of her inspection as they were in the photographs.

Plaintiff has presented sufficient evidence to demonstrate that there are triable issues of fact precluding summary judgment. In its opposition papers, plaintiff submits, *inter alia*, the affidavit of Robert Liss, PE, a professional engineer who affirms that he conducted an in-person examination of the staircase known as P12 located at the 179th Street station in Queens, New York on May 25, 2005 and that based on photographs identified by the plaintiff, the condition of the staircase on May 25, 2005 was the same as it was at the time of the accident. Mr. Liss concludes that: "[t]he only projection permitted in a set of stairs is the handrail which is allowed to project three and a half inches into the stairwell width. The base plate which extended 2 inches into the stair width at the tread is clearly not considered to be allowed to project into the stairway width and is a violation of the New York City Building Code. It is this two inch protrusion into the stairway which created the precipitating cause of the accident. Additionally, according to good and accepted engineering practices, stairways should not be constructed with the base plates intruding into the tread width." Plaintiff also proffers plaintiff's own examination before trial transcript testimony.

Plaintiff presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. There are triable issues of fact in connection with, *inter alia*, whether a defective condition existed, whether defendant had either actual or constructive notice of a defective condition, and whether

defendant created a defective condition causing plaintiff's accident. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of this Court.

Dated: June 6, 2008

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Howard G. Lane, J.S.C.