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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Index Number: 118895/2006

PARRAGUEZ, CARMEN
vs.
WEST 13TH STREET OWNERS, INC

INDEX NO. _____
MOTION DATE 7/25/08
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

Sequence number: 001
SUMMARY JUDGMENT

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
The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendant West 13th Street Owners, Inc., for an order pursuant to CPLR 3212, granting summary judgment dismissing the Verified Complaint of plaintiff Carmen Parraguez, **is denied**; and it is further

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

FILED
JUL 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/08

CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ 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

CARMEN PARRAGUEZ,

Plaintiff,

-against-

WEST 13th STREET OWNERS, INC.,

Defendant.

EDMEAD, J.S.C.

Index No. 118895/06

DECISION/ORDER

MEMORANDUM DECISION

Defendant West 13th Street Owners, Inc. ("defendant") moves for an order pursuant to CPLR 3212, granting summary judgment dismissing the Verified Complaint of plaintiff Carmen Parraguez ("plaintiff").

Plaintiff alleges that on November 11, 2006, she tripped and fell on the sidewalk adjacent to the premises 30 West 13th Street, New York, New York (the "subject premises") due to a garden hose lying on the sidewalk.

Defendant's Contentions

Plaintiff cannot establish a *prima facie* case of negligence against defendant because the garden hose which she allegedly tripped over, which had been lying across the sidewalk, was an open and obvious condition that was not inherently dangerous. Moreover, plaintiff is not alleging that she failed to see the hose before falling or that she slipped on excess water present on the sidewalk. In light of these facts, there was no warning or other preventative measure that defendant could have undertaken to prevent plaintiff's incident.

Plaintiff's Opposition

Defendant created a dangerous condition in two ways. Obstructing a sidewalk with a hose is inherently dangerous. Thus, defendant's duty to maintain premises is not extinguished, but rather continues to exist when it is an open and obvious danger. Additionally, it was defendant's simple negligence in holding the hose and causing it to move up and trip plaintiff just as she was stepping over it, which was a concurrent proximate cause of plaintiff's accident and injuries.

Defendant acknowledges that plaintiff fell when the hose she was stepping over lifted up, causing her foot to get caught in the hose and the fall. Defendant ignores the clear import of its own simple negligence in causing this accident.

Defendant's Reply

It is plaintiff's speculation that the hose she was stepping over rose up constituting a dangerous condition on the sidewalk. Further, the hose did not constitute a dangerous condition because plaintiff testified that she observed the hose on the sidewalk about 2 or 3 meters before encountering it and proceeded to step over it. Plaintiff readily admits that she observed the green hose before her accident.

Analysis

CPLR 3212: Summary Judgment

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 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]). 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]).

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]).

Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv. dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

As the Court of Appeals observed in *Tagle v Jakob* (97 NY2d 165 [2001]), a landowner has no duty to warn of an open and obvious hazardous condition, one which would be apparent to "[a]ny observer reasonably using his or her senses" (id. at 170).

The theory underlying the "open and obvious" doctrine is this: "Where a danger is readily apparent as a matter of common sense, 'there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided.' Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning." (*Liriano v Hobart Corp.*, 92 NY2d 232, 242 [1998], quoting Prosser and Keeton, Torts § 96, at 686 [5th ed].)

The hazard or dangerous condition must be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open (see *Tagle v Jakob*, 97 NY2d 165 [2001]), making a posted warning of the presence of the hazard superfluous (*Liriano, supra*). Therefore, a plaintiff's theory of negligence based upon the claim that the property owner violated its duty to warn of the claimed hazard may be dismissed upon a demonstration that the hazard was open and obvious.

Here, however, the nature of this alleged hazard simply does not compel the conclusion as a matter of law that the claimed hazard was so obvious that it would necessarily be noticed by any careful observer, so as to make any warning superfluous.

Nor is the mere fact that a defect or hazard is capable of being discerned by a careful observer the end of the analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked.

Even if the court agreed that the claimed hazard here was open and obvious as a matter of law, the court would still deny summary judgment, since plaintiff is not claiming a violation of the duty to warn, but a violation of the broader duty to maintain the premises in a reasonably safe

condition. "[T]he duty to maintain premises in a reasonably safe condition is analytically distinct from the duty to warn, and that liability may be premised on a breach of the duty to maintain reasonably safe conditions even where the obviousness of the risk negates any duty to warn." *(Cohen v Shopwell, Inc.*, 309 AD2d 560, 562 [2003], *citing MacDonald v City of Schenectady*, 308 AD2d 125 [3d Dept 2003]).

In the instant case, in response to the question: what, if anything, did plaintiff do to avoid the hose before her accident. Plaintiff responded: I lifted one foot to go over it....And as I lifted the next foot, it seemed like the hose lifted up as well (Pl.'s dep. p. 38).

Mr. Mahon, defendant's vice president of maintenance testified that he was hosing down the sidewalk when plaintiff's accident occurred (Mahon dep. p. 20). He turned off the water at the nozzle and was holding the hose as plaintiff approached. He turned and was facing and talking to a co-worker (Mahon dep. pp. 34-37). He was not aware of the position of the hose at the time of plaintiff's accident (Mahon dep. p. 40). This sufficiently raises as issue of fact as to whether the hazard was open and obvious and whether defendant was simply negligent in its handling of the hose.

As the First Department explained in *Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69, 773 N.Y.S.2d 38 (1st Dept 2004), the question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion (see *Tagle v Jakob*, 97 NY2d 165, 169 [2001]); ("in cases where reasonable minds might disagree as to the extent of plaintiff's knowledge of the hazard," the question of liability for failure to warn is within the province of the jury," *Liriano v Hobart Corp.*, 92 NY2d 232, 241 [1998]).

Even assuming that the hazardous condition was open and obvious, such evidence would go toward the issue of comparative negligence (Westbrook at 72-73, 773 N.Y.S.2d 38).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant West 13th Street Owners, Inc., for an order pursuant to CPLR 3212, granting summary judgment dismissing the Verified Complaint of plaintiff Carmen Parraguez, **is denied**; and it is further

ORDERED that counsel for defendant 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: July 29, 2008

Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED
JUL 30 2008
COUNTY CLERK'S OFFICE
NEW YORK