

Matosevic v Berman

2008 NY Slip Op 32823(U)

October 6, 2008

Supreme Court, Queens County

Docket Number: 26255/06

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

MARLI MATOSEVIC,

Plaintiff,

-against-

CHARLOTTE BERMAN, et al.,
Defendants.

GARDEN LEASING LIMITED LIABILITY
COMPANY and MID STATE MANAGEMENT
CORPORATION,
Third-Party Plaintiffs,

-against-

R.B. WYARR MANUFACTURING CO., INC.,
Third-Party Defendant.

Index No. 26255/06

Motion
Date September 2, 2008

Motion
Cal. No. 25 and 26

Motion
Sequence No. 5 and 4

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NUMBERED

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Upon the foregoing papers it is ordered that the motion by defendants Garden Leasing Limited Liability Company and Mid State Management Corporation (collectively "Garden") for summary judgment pursuant to CPLR 3212, dismissing the plaintiff, Marli Matosevic's Complaint against said defendants and any and all cross claims on the grounds that plaintiff has failed to establish a *prima facie* case of negligence is hereby granted; and the motion by defendant Charlotte Berman for an Order pursuant to CPLR 212, granting summary judgment, dismissing the plaintiff's

Complaint against defendant and any and all cross claims on the grounds that plaintiff has failed to establish a *prima facie* case of negligence as against defendant is hereby denied. Both motions are consolidated solely for the purpose of disposition.

On May 25, 2005, plaintiff was allegedly injured while she was working in her capacity as a Home Health Aide to defendant Charlotte Berman, when a glass shower door struck plaintiff at the premises located at 62-60 108th Street, Apt. 6-H, Forest Hills, New York. Defendant Charlotte Berman is the lessee and tenant of the subject apartment, and defendant Garden Leasing Limited Liability Company is the owner of the building. Plaintiff maintains that as a result of the negligence of the defendants in the ownership, operation, maintenance, and control of the premises, she sustained severe and grievous personal 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 defendants 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.*).

A. Defendants' prima facie showing of triable issue of fact

Defendants Garden Leasing Limited Liability Company and Mid

State Management Corporation (collectively "Garden") and defendant Charlotte Berman established their *prima facie* entitlement to summary judgment by showing that they neither created an unsafe condition nor had actual or constructive notice thereof (*see, Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2nd Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2nd Dept 1997]). Defendants argue that the plaintiff has failed to establish any triable issues of fact establishing negligence on the part of defendants since: the record clearly establishes that the subject shower doors did not constitute a defective condition as the shower doors complied with all applicable building codes that were in effect at the time they were installed; plaintiff has failed to establish that defendants violated any statutory duty, created the alleged condition, or had actual or constructive notice of the condition which allegedly caused plaintiff's injuries; plaintiff has failed to show that defendants actions were the proximate cause of plaintiff's accident and has presented no evidence establishing that defendants breached their duty of care regarding the subject premises.

1. Defendants Garden and Berman establish a prima facie showing that there are no triable issues of fact

In support of their motion, the Garden defendants provide *inter alia*, the affidavit of John Brady, the property manager for the subject building who is employed by defendant Mid State Management Corporation, a corporation that manages residential and commercial buildings, and has been employed as such since October 2004. Mr. Brady affirms that: a review of the records maintained by Mid State Management for the subject apartment revealed no records regarding requests to install, permission to install, or the installation or composition of glass shower doors in defendant Charlotte Berman's Apartment between January 1960 and May 23, 2005, the date of plaintiff's accident; that Mid-State Management was never informed that the shower doors installed by defendant Berman's husband were not made of safety glass; that Mid State is not in possession of any records regarding requests for repairs, or records of repair of the glass shower doors in Ms. Berman's apartment between January 1960 and May 23, 2005; that Mid State is not in possession of any records indicating that complaints were made regarding the condition or operation of the shower doors located in the subject apartment between January 1960 and May 23, 2005; that Mid State is not in possession of any records indicating any accidents involving shower doors located in the subject apartment prior to May 23, 2005; that the glass shower doors have never been installed by Garden Leasing Corporation, Garden Leasing Limited Liability Company, Mid State Management, or the building management in any apartment located on 62-60 108th Street, Forest Hills, New York, for the period of January 1, 1960 through and including May 23,

2005; and finally, that no renovations have been made to the building during any twelve month period between 1960 and 2005, exceeding 30% of the entire building's value. Additionally, in support of the motions, defendants presents the affidavit of Jeffrey Schwalje, P.E., P.P., a professional engineer and a principal of a consulting engineering firm. He affirms, *inter alia*, that on February 18, 2008, he inspected the bathroom and shower door located in the subject apartment and that the subject shower door was installed by the tenant in 1960; that the subject shower door did not violate any New York State, City of New York, or federal codes or regulations in effect at the time of installation; that the shower door was properly and safely maintained; the subject shower door was in compliance with the applicable provisions of the New York City Building Code, New York State Consolidated Laws-General Business Article 25-B, and all federal codes, regulations and standards in effect at the time of the installation. Further, the defendants provide the deposition testimony of: plaintiff herself, defendant Charlotte Berman, plaintiff's husband (Mario Matosevic), and Jorge Cortez, who is employed by Mid State Management as the temporary superintendent for the subject building. Through the aforementioned evidence, the Garden defendants established that there are no triable issues of fact.

2. Plaintiff has demonstrated that there are triable issues of fact against defendant Berman

Plaintiff has presented sufficient evidence to demonstrate that there are triable issues of fact precluding summary judgment against defendant Charlotte Berman. In her opposition papers, plaintiff submits, *inter alia*, the affidavit of Stanley H. Fein, P.E. who affirmed that he conducted an inspection of the shower doors on April 15, 2008. Mr. Fein affirms that: "[his] inspection of the door track revealed that it was worn away along the bottom of the track. There was only a 1/4 inch clearance between the door and the track which created a condition where the door would come loose from the track due to the worn away and unlevel condition of the bottom track. This condition existed for an extended period of time and when opening and closing the door, it would have been obvious that the door was not moving truly due to the thump that would have occurred each and every time that the door was opened at the portion of the rail." He also affirms that he took photographs of the inspection which are annexed to the instant motion papers. Mr. Fein concludes that "the improper maintenance of the bottom door track and the deterioration fo the track created an extremely hazardous condition whereby the door would easily come loose due to the worn condition of the track" and that "the accident and injuries sustained by Marli Matosevic on May 23, 2005 was caused as a result of the door being maintained in an unsafe manner creating a dangerous and hazardous condition which came upon the user as a

dangerous and unexpected trap." Plaintiff also proffers plaintiff's own examination before trial transcript testimony and affidavit, as well as the examination before trial transcript testimony of defendant Charlotte Berman. Plaintiff testified at her examination before trial that she observed Ms. Berman having trouble opening the shower doors prior to the date of the accident since the doors "would get stuck."

Plaintiff presented sufficient evidentiary proof in admissible form to establish triable issue of fact against defendant Charlotte Berman. There are triable issues of fact in connection with, *inter alia*, whether a defective condition existed, whether defendant Charlotte Berman had either actual or constructive notice of a defective condition, whether defendant, Charlotte Berman created a defective condition causing plaintiff's accident, and whether defendant Charlotte Berman acted reasonably under the circumstances. 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 Charlotte Berman's motion for summary judgment against plaintiff is denied.

3. Plaintiff has failed to demonstrate that there are triable issues of act against defendant Garden

Plaintiff has presented insufficient evidence to demonstrate that there are triable issues of fact precluding summary judgment as against defendants, Garden Leasing Limited Liability Company and Mid State Management Corporation (collectively "Garden"). In her opposition papers, plaintiff submits, the aforementioned affidavit of Stanley H. Fein, P.E., plaintiff's own affidavit, examination before trial transcript testimony of plaintiff, photographs of the shower, and an attorney's affirmation. Plaintiff failed to present evidence that the Garden defendants 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]). Plaintiff makes no claim that the Garden defendants created the dangerous condition; as she makes no claim of improper installation or re-installation of the shower doors by the Garden defendants, and admits that the doors were installed by her husband without the prior consent of the defendant. Additionally, plaintiff failed to prove that the Garden defendants had either actual or constructive notice of a defective condition. 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, *Gordon, supra*). No proof has been submitted that the Garden defendants directly/actually observed any defective condition prior to the accident, and no proof has been submitted that any defective condition existed for any amount of time before the accident occurred. While defendants' expert opines

there never existed a defective condition, plaintiff's expert first inspected the condition, several years after the accident, in 2008, and did not comment on the specific time the alleged defective condition first came into existence or the fact of its existence as of the date of the accident in 2005. Neither plaintiff herself nor her expert was able to establish that the shower door was either defective at the time of the accident or that the defective shower door was a proximate cause of the injury. As there remains no issues of fact in dispute, the Garden defendants' motion for summary judgment is granted and the Complaint shall be dismissed against them.

This constitutes the decision and order of this court.

Dated: October 6, 2008

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Howard G. Lane, J.S.C.