Mercado v Broadway Towers Assoc., LLC

2008 NY Slip Op 33590(U)

December 11, 2008

Supreme Court, New York County

Docket Number: 100972/07

Judge: Judith J. Gische

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SCANNED ON 12/17/2008

[* 1]

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

PRESENT: HON. JUDITH J. GISCHE J.S.C./Justice

PART 10

Index Number : 100972/2007

MERCADO, MERCEDES

vs

BROADWAY TOWERS ASSOC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. ________

MOTION DATE ________

MOTION SEQ. NO. ________

MOTION CAL. NO. ________

his 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

FILED
DEC 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

Dated: 12/11/08

HON. JUDITH J. GISCHE J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

MERCEDES MERCADO,
Plaintiff,

-against-

BROADWAY TOWERS ASSOC., LLC, and
MILBROOK PROPERTIES, LTD,

Defendants.

Index No.: 100972/07
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

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DEC 17 2008
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NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's motion [sj] w/CMK affirm in support, exhs	1
Pltf's TAN affirm in opp, exhs	2
Def's JPC reply affirm, exh	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action by plaintiff arising from a slip and fall. Defendants Broadway Towers Associates, LLC (the "owner") and Milbrook Properties Ltd. now move for summary judgment against plaintiff. CPLR § 3212. Plaintiff opposes the instant motion.

Issue has been joined and since the motion was brought timely after the note of issue was filed, it will be considered on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

In July 2006, plaintiff resided with her son and his family at the building located at 639 West 173rd Street, Apartment 8B, in New York, New York (the "building"). On July 23, 2006 at approximately 10:20 p.m., plaintiff slipped and fell as she descended a

stairwell on the sixth floor of the building. Plaintiff claims that she fell because the light fixture at the portion of the stairwell where she fell was not operational.

Defendants sole argument in support of its motion for summary judgment is that plaintiff cannot establish actual and/or constructive notice of the dangerous condition which caused the accident. Plaintiff testified at her deposition, with the assistance of an interpreter, that she typically used the elevator in the building. However, because the elevator was not functioning on July 23, 2006, she used the stairs that day. Specifically, plaintiff went up the stairs at approximately 6 - 7pm and fell while going down the stairs at approximately 10:30pm. Plaintiff testified that before her accident, she had not used the stairs for at least a week, if not longer.

Plaintiff further testified as follows:

> Q. When you walked up the stairs at about 6:00 to 7:00 earlier that day, was there artificial lights on between the fifth and sixth floor?
>
> A. I don't remember. No.
>
> Q. When you went up the stairs earlier that day between 6:00 and 7:00 p.m., were the light (sic) on between the sixth and seventh floors?
>
> A. From the seventh up.
>
> Q. First I want to know from the sixth to the seventh.
>
> A. I really don't remember.

Ramon Gregorio, superintendent for the building testified at his deposition as follows:

> Q. That evening, that Sunday evening when you entered the B stairway and observed the things left by the ambulance personnel, did you observe whether the light fixture in that area was on or off?

A. On the 5 floor it was on.

Q. Did you make any observation as to whether the fixture on the floor above, the 6 floor, was on?

A. That one was off.

Q. Do you know for how long the 6 floor fixture wasn't working before that time you went into the B stairwell that night?

A. No.

Q. Do you know if it was only out that day, a day before, two days, three days or some other time period?

A. This light fixture, specifically the bulbs don't go out both at the same time.

Q. The question is: Do you know for how long that fixture wasn't working for whatever the reason was, okay? Whether it was just the day fo the accident, a day before or two days or some other time?

A. When I arrived there at that moment and saw the situation, it was off. Now, life is like this: It can just go out.

Q. This is the only question, all right: Do you know if that fixture wasn't working the day before or two days before or --

A. I don't know.

Defendants argue that there are no facts establishing actual notice. It further argues that because plaintiff cannot say that the light was out for a long enough period for defendants to have acted, there is no constructive notice. In opposition, plaintiff has provided the sworn affidavit of Harold Mercado, her son ("Mr. Mercado"). Mr. Mercado claims that he used the stairwell numerous times during the days preceding plaintiff's accident. Mr. Mercado states that the "particular light [in the area of the stairwell where

plaintiff fell] had been out for at least three full days [prior to plaintiff's accident], since Thursday evening, July 20, 2006."

Discussion

The moving party seeking summary judgment has the initial burden of proving its *prima facie* case. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if the moving party meets its initial burden of proving that it is entitled to summary judgment, as a matter of law, will the burden then shift to the opponent who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). Granting a motion for summary judgment is the functional equivalent of a trial, therefore, it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977).

A plaintiff in a slip and fall case must establish that the defendant either created the condition that caused the accident or that it had actual or constructive notice of the dangerous condition. Gordon v. American Museum of Natural History, 67 NY2d 836 (1986). The issue of whether a dangerous or defective condition exists usually depends on the peculiar facts and circumstances of each case and is generally an issue of fact. Trincere v. County of Suffolk, 90 NY2d 976 (1997).

Here there is clearly an issue of fact regarding the length of time that the light had been non-operational before the accident. Defendants argue that the court should disregard Mr. Mercado's affidavit because it is "feigned evidence tailored to avoid the consequences of plaintiff's deposition testimony", and therefore plaintiff has failed to

demonstrate actual or constructive notice of the darkness condition in the stairwell. Defendants rely on Phillips v. Bronx Lebanon Hosp., [268 AD2d 318 (2000)]. where the First Department held that affidavits submitted by a plaintiff in opposition to a motion for summary judgment were insufficient to raise a genuine triable issue of fact because they clearly contradicted plaintiff's own deposition testimony. Integral to the analysis in Phillips is a finding that such evidence "can only be considered to have been tailored to avoid the consequences of [a plaintiff's] earlier testimony."

Defendants' argument that Phillips is applicable here must be rejected because Mr. Mercado's affidavit does not directly contradict plaintiff's deposition testimony. Plaintiff did not testify that the light was functional at anytime prior to her accident, but rather, that she could not remember one way or the other whether the light was operational at approximately 6-7pm, when she first used the stairs. Mr. Mercado, on the other hand, states that he personally observed the light being out for "at least three full days" prior to plaintiff's accident, because he "used the stairwell numerous times" during the days preceding plaintiff's accident. Moreover, Mr. Gregorio, the superintendent, testified at his deposition that he did not know if the light was operational before plaintiff's accident. Here, Phillips is distinguishable from the facts in this case because there is no basis for the court to conclude that Mr. Mercado's affidavit was obviously tailored to demonstrate the element of constructive notice.

Defendants further argument that Mr. Mercado did not "complain to anyone that the lighting was inadequate in the stairwell prior to the accident" is irrelevant because plaintiff is not arguing that the defendants had actual notice, but rather, that they had constructive notice of the darkness condition. Therefore, whether defendants had

constructive notice of the darkness condition in the stairwell is a triable issue of fact for the jury to determine. The court also rejects defendants claim that they did not know about Mr. Mercado. He was clearly identified as a fact witness in this case. Accordingly, defendants' motion for summary judgment is denied.

Conclusion

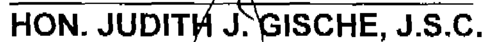
Defendant has failed to establish the absence of any genuine issue of fact. Even if defendant had met its burden, plaintiff has demonstrated, by admissible evidence, facts which could lead a jury to conclude that the alleged accident was caused by a dangerous condition and that defendant had actual and/or constructive notice of the alleged defect. Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision on the office of trial support so that it may be scheduled for trial and assigned.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
December 11, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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