

Rosario v Port Auth. of N.Y. & N.J.

2009 NY Slip Op 30799(U)

April 7, 2009

Supreme Court, New York County

Docket Number: 112631/05

Judge: Doris Ling-Cohan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

Rosario

INDEX NO. 112631/05

MOTION DATE _____

- v -
The Port Authority of New York

MOTION SEQ. NO. 003

& American Airlines Inc.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment
is decided in accordance with the attached
memorandum decision

FILED

APR 09 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: [Signature]

[Signature]

JUSTICE DORIS LING-COHAN^{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: IAS PART 36

-----X

BEATRIZ ROSARIO, as Administratrix of the Estate of
FINETTA VILLA, deceased,

Plaintiff,

Index No.: 112631/05
DECISION/ORDER

-against-

Motion Seq. No.: 003

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY and AMERICAN AIRLINES,

Defendants,

-----X

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury action, defendants move for summary judgment to dismiss the complaint (motion sequence number 003). For the following reasons, this motion is granted in part and denied in part.

FILED
APR 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

The Parties

On September 25, 2004, plaintiff's decedent, Finetta Villa (Villa), sustained injuries to her right knee and teeth when she tripped and fell on the roadway in front of Terminal 8 at JFK International Airport in the County of Queens, City and State of New York. See Notice of Motion, Exhibit C (complaint), ¶ 19. At the time of her injury, Villa was 75 years old and a resident of New York. See Genis Affirmation in Opposition, ¶ 6. Villa died in December of 2006, at the age of 77. *Id.*, ¶¶ 5-6. Thereafter, Villa's daughter, Beatriz Rosario (Rosario), was appointed the administratrix of Villa's estate. See Notice of Motion, Mulderig Affirmation, ¶ 7. Rosario is now the plaintiff of record because Villa had commenced this action on September 8, 2005. *Id.*

Defendant Port Authority of New York and New Jersey (the PA) is the owner of JFK International Airport. *Id.*; Exhibit C, ¶ 6. Defendant American Airlines (American) is the lessor of Terminal 8. *Id.*, ¶¶ 7-8. The lease between the PA and American (the lease) provides, in pertinent part, as follows:

Section 10 Care, Maintenance, Rebuilding and Repair by the Lessee

(b) The Lessee [i.e., AA] shall, throughout the term of this Lease, assume the entire responsibility and shall relieve the [PA] from all responsibility for all repair, rebuilding and maintenance whatsoever in the Premises (and off the Premises as provided below), whether such repair, rebuilding or maintenance be ordinary or extraordinary, partial or entire, inside or outside, foreseen or unforeseen, structural or otherwise, and without limiting the generality of the foregoing, the Lessee shall:...

(3) Take good care of the Premises and maintain the same at all times in good condition, perform all necessary preventive maintenance, included but not limited to painting ...; and make all repairs and replacements, and do all rebuilding, inside and outside, ordinary and extraordinary, partial and entire, foreseen and unforeseen, structural and otherwise, which repairs, rebuilding and replacements by the Lessee shall be in quality and class not inferior to the original in materials and workmanship...

(7) Be responsible for the maintenance and repair of any damage to the paving or other surface of the Premises caused by any oil, gasoline, grease, lubricants or other flammable liquids and substances having a corrosive or detrimental effect thereon...

Section 17 Rights of Entry Reserved...

(e) Nothing in this Section shall or shall be construed to impose upon the [PA] any obligations so to construct or maintain or to make repairs, replacements, alterations or additions, or shall create any liability for any failure to do so. The Lessee is and shall be in exclusive control and possession of the Premises and the [PA] shall not in any event be liable for any injury or damage to any property or to any Person happening on or about the Premises nor for any injury or damage to the Premises nor to any property of the Lessee or of any other Person located in or thereon (other than those occasioned by the affirmative acts of the [PA], its employees, agents or representatives).

Id.; Exhibit J, at 94-96, 104-105.

Villa was deposed on October 19, 2006. *Id.*; Exhibit F. She stated that she fell while following a luggage handler across the street between the sidewalk in front of Terminal 8 and the median beyond it where cabs and busses park. *Id.* at 25-26. Villa stated that she then stepped into a hole, about a half a foot long and less than an inch deep, with her right foot. *Id.* at 31-32. Villa specifically stated that: "The car had stopped, that's when I stuck my foot in the hole and I didn't notice that the hole was there. They were fixing the street." *Id.* at 13.

Rosario was deposed on August 5, 2008. *Id.*; Exhibit G. She stated that she met her mother when she returned home from the airport in a van, heard the story of the accident, and observed her mother's injuries. *Id.*, at 42-45. Rosario also states that she took her mother back to the accident site a week after she was injured, that her mother confirmed that the area was in the same condition as it had been a week before, and that pictures which were taken at that time (i.e., one week after the fact) were an accurate portrayal of the condition. *Id.* at 67-72, 80-84, 119-120.

The PA was deposed via Donald Rivas (Rivas), one of its property representatives, on August 11, 2008. *Id.*; Exhibit H. Rivas stated that, pursuant to the terms of the lease, the PA was not responsible for inspecting, repairing or cleaning the portion of the street where Villa was injured. *Id.* at 30-32.

AA was deposed via Donald Smith (Smith), one of its facilities maintenance managers, on August 18, 2008. *Id.*; Exhibit I. Smith stated that AA was responsible for repairing the paving in the area where Villa had been injured, and also stated that AA had contracted with a cleaning company to clean that area at the time Villa was injured. *Id.* at 23-24, 47-48.

As previously mentioned, Villa commenced this action on September 8, 2005. Her complaint sets forth one cause of action for negligence. *Id.*; Exhibit C. Defendants served their joint answer with affirmative defenses on October 28, 2005. *Id.*; Exhibit D. Discovery now having been completed, defendants move for summary judgment to dismiss the complaint.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which requires a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *See e.g. Andre v Pomeroy*, 35 NY2d 361 (1974); *Pirrelli v Long Is. R.R.*, 226 AD2d 166 (1st Dept 1996). However, the court's reluctance to employ summary judgment "only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated." *Blechman v I.J. Peicer's and Sons*, 186 AD2d 50, 51 (1st Dept 1992), quoting *Andre v Pomeroy*, 35 NY2d at 364. Here, the court finds that the PA is entitled to summary judgment dismissing the complaint, but that AA is not.

The Port Authority

The PA argues that, as an out-of-possession landlord, it cannot be found liable for Villa's injuries. See Defendants' Memorandum of Law, at 5-10. The Court of Appeals holds that an out-of-possession landlord may generally only be held liable for an injury caused by a defective or dangerous condition upon the leased premises if the landlord is under a statutory or contractual duty to maintain those premises in repair, and has reserved the right to enter the premises for inspection and repair. See e.g. *Chapman v Silber*, 97 NY2d 9, 19-20 (2001); *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 643 (1996). The PA observes that, under the plain language of Section 17 (e) of the lease, it has no contractual obligation to perform any repairs to Terminal 8. The PA further notes that, in numerous cases, the Appellate Divisions for both the First and Second Departments have specifically acknowledged that no existing statute imposes a duty on the PA to maintain and repair the various terminals that it leases to individual airlines at JFK International Airport.¹ See e.g. *D'Orlando v Port Auth. of NY & NJ*, 250 AD2d 805 (2d Dept 1998); *Laster v Port Auth. of NY and NJ*, 251 AD2d 204 (1st Dept), *lv denied* 92 NY2d 812 (1998); *Stark v Port Auth. of NY and NJ*, 224 AD2d 681 (2d Dept 1996); *Santiago v Port Auth. of NY and NJ*, 203 AD2d 217 (1st Dept), *lv denied* 84 NY2d 807 (1994); *Love v Port Auth. of NY and NJ*, 168 AD2d 222 (1st Dept 1990). Finally, the PA asserts that the language in the instant lease is identical to the language that was contained in the leases in several of the above cited decisions. See Defendants' Memorandum of Law, at 9. Rosario's opposition papers do not

¹ The court notes that there is no blanket rule that exempts the PA from premises liability at JFK International Airport simply because it is an out-of-possession landlord. See e.g. *Zappel v Port Auth. of NY & NJ*, 285 AD2d 389 (1st Dept 2001). However, plaintiff here has chosen not to argue the issue of the extent, if any, of the PA's right of reentry at Terminal 8.

address the PA's out-of-possession landlord argument at all. Therefore, the court deems the matter conceded and therefore, there are no triable issue of fact as to whether the PA owed Villa a duty of care to maintain the premises where she was injured. Accordingly, the branch of defendants' motion which seeks to have the complaint dismissed as against the PA is granted.

American Airlines

Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). With respect to AA, the lease clearly imposes a contractual duty of care (as discussed above). Because this is a personal injury action, however, the Appellate Division, First Department, also requires that:

To establish a prima facie case on a slip and fall, plaintiffs ... must show that the defendants either created a dangerous condition or had actual or constructive knowledge of the condition. In order to constitute constructive notice, a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owners'] employees to discover and remedy it'." The burden may also be satisfied by providing evidence that an "ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord" [internal citations omitted].

Lemonda v Sutton, 268 AD2d 383, 384 (1st Dept 2000).

Here, AA argues that there is no evidence of how long the condition (the hole in which Villa tripped) had existed at the time of and/or prior to the accident.² See Defendants' Memorandum of Law, at 11. AA notes that the photographs of the accident site, which the witnesses reviewed at their depositions, had been taken one week after Villa was injured. *Id.* AA concludes that there is, therefore, "no evidence as to how long, if [at all], the condition was

² The PA did not raise this argument; however, plaintiffs did not assert that the PA had notice of the dangerous/defective condition.

in existence prior to the accident.” *Id.*

Rosario responds that she had taken her mother back to the accident site a week after her injury, and that her mother confirmed that the area was the same as it had been a week before, and that the photographs in question were accurate depictions of that condition. *See* Notice of Motion, Exhibit G, at 67-72, 80-84, 119-120. AA does not respond to this argument in its reply papers.

The Appellate Division, First Department, has long held that photographs may be used to prove constructive notice of an alleged defect if they are taken reasonably close to the time of the defendant’s accident, and there is testimony that the condition at the time of the accident was substantially as shown in the photograph. *See e.g. Denyssenko v Plaza Realty Servs.*, 8 AD3d 207, 208 (1st Dept 2004) (photographs of accident site taken approximately two weeks after plaintiff’s injury); *Karten v City of New York*, 109 AD2d 126 (1st Dept 1985) (photographs of accident site taken approximately three weeks after plaintiff’s injury). The court reasons that a jury can infer from the appearance of the defect exhibited in the photograph that the condition must have come into existence over such a length of time that the defendant should have acquired knowledge of the condition in the exercise of reasonable care - the definition of constructive notice. *Karten v City of New York*, 109 AD2d at 127-128.

Here, both sides admit that the photographs reviewed at the depositions were taken approximately one week after Villa was injured. *See* Defendants’ Memorandum of Law, at 11. Further, Rosario testified that she examined both the photographs and the actual accident site, and that the photographs accurately portrayed the accident site one week after her mother was injured. *See* Notice of Motion, Exhibit G, at 67-72, 80-84, 119-120. Therefore, there is a triable

issue of fact exist as to whether AA had constructive notice of the condition that caused Villa's injury, and AA's argument that it did not owe Villa a duty of care is rejected. Accordingly, the branch of defendants' motion that seeks to have the complaint dismissed as against AA is denied.

DECISION

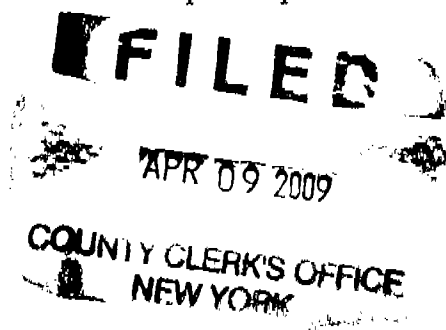
Accordingly, for the foregoing reasons, it is


ORDERED that the motion pursuant to CPLR 3212, by defendants Port Authority of New York and New Jersey and American Airlines is granted to the extent that the complaint is severed and dismissed as against the defendant Port Authority of New York and New Jersey, and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk, but is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that, within 30 days of entry of this order, defendant Port Authority of New York and New Jersey shall serve a copy of this order upon all parties with notice of entry.

Dated: New York, New York
April 7, 2009





Hon. Doris Ling-Cohan, J.S.C.