Doskalieva v Kryzhapoolsky

2009 NY Slip Op 32003(U)

August 20, 2009

Supreme Court, Nassau County

Docket Number: 13398/08

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

VALENTINA DOSKALIEVA,

INDEX NO.: 13398/08

Plaintiff,

MOTION DATE:7-14-09
SUBMIT DATE:8-20-09
SEQ. NUMBER - 001

-against-

BORIS KRYZHAPOOLSKY,

Defendant.

----------x

The following papers have been read on this motion:

Notice of Motion, dated 6-18-09.....1
Affirmation in Opposition, dated 7-29-09.....2
Reply Affirmation, dated 8-17-09.....3

This motion by defendant for an order pursuant to CPLR §3212 granting summary judgment dismissing the compliant is denied.

This is an action to recover damages for personal injuries based upon a slip and fall by the plaintiff, who on May 12, 2006, at approximately 10:30 - 11:30 AM, was employed at defendant's home in Hewlett, New York. The plaintiff alleges that the defendant was negligent in its maintenance of the aforesaid premises, and this caused her to slip and fall on

a square of wood, made wet and slippery by a recent rainfall. Plaintiff had been employed as a nanny at defendant's home for about eight months prior to the accident. She alleges that on the date of the incident, it had rained in the morning but had stopped by the time the accident happened. She slipped and fell on a wet slippery board that had been placed on a path leading to the garbage receptacles. The board approximately one meter, 20 cm by one meter had been installed to replace missing concrete in the concrete path and had been in place for several months prior to the accident.

Defendant's motion is supported solely by an affirmation of defendant's attorney who does not profess to have any personal knowledge and the oral depositions of the plaintiff and defendant. Although plaintiff and defendant identified photographs of the accident area, they have not been submitted. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendant's attorney does not profess to possess personal knowledge of any facts asserted and has not employed her affirmation as a vehicle to refer to other competent evidence. Defendant testified that he usually leaves for work about 9:00 AM but gives no other specifics as to conditions or his actions on the day of the accident. Defendant denies having any wooden flooring on the day of the accident but does not otherwise address the specifics of plaintiff's testimony as to the photographs, duration, size and location of the wooden board.

Defendant's attorney contends that no dangerous or defective condition existed and that if it did so exist, it was not created by defendant or defendant did not have constructive or actual notice thereof.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must

come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James*

v. Albank, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

In order for a defendant to successfully move for summary judgment in a slip and fall case it "has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice." *Joachim v. 1824 Church Ave., Inc.* 12 AD3d 409 (2nd Dept. 2004); *Valdez v. Aramark Servs.*, 23 AD3d 639, (2nd Dept. 2005). Actual notice may be found where the defendant created the condition, or was aware of its existence prior to the accident. *Pianforini v. Kelties Bum Steer*, 258 AD2d 634, 635 (2nd Dept. 1999). 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 a defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History,* 67 NY2d 836, (1986). A defendant may satisfy its burden of showing that it had no notice of a dangerous condition if there is proof of regular inspection of the area in question and "any remedial action just prior to the incident." *Hagin v. Sears,* 61 AD3d 1264, 1266 (3rd Dept. 2009).

To satisfy the burden on the issue of lack of constructive notice, the moving defendant must provide evidence when the area was last inspected relative to the time of the injured plaintiff's accident. *Gerbi v. Tri-Mac Enterprises of the Storny Brook, Inc.*, 34 AD3d 732, 733 (2nd Dept. 2006); *Birnbaum v. New York Racing Ass'n, Inc.*, 57 AD3d 598, 598-99 (2nd Dept. 2008). In *Yioves v. T.J. Maxx, Inc.*, 29 AD3d 572-73 (2nd Dept. 2006), the Court held that defendant did not make a *prima facie* showing that it neither created the dangerous condition nor had actual or constructive notice of the defect because the defendant failed to introduce evidence that the puddle at issue was not visible and apparent.

It is only after the moving defendant has satisfied the threshold burden of proving a *prima facie* case that the Court will examine the sufficiency of the plaintiff's opposition. *Fox v. Kamal Corp.*, 271 AD2d 485 (2nd Dept. 2000). Moreover, "merely pointing out gaps in the plaintiff's case" will not satisfy the defendant's burden of proving that it did not have notice and did not create the condition. *DeFalco v. BJ's Wholesale Club, Inc.*, 38 AD3d 824 (2nd Dept. 2007).

Here, the defendant did not meet his burden of establishing a *prima facie* showing that a dangerous condition did not exist or if so that he did not create the dangerous condition, nor have actual or constructive notice. Defendant's deposition did not provide information demonstrating that he did not install the wooden board or that he was familiar with the area on the date in dispute.

Accordingly, the Court finds that the defendant, as the movant, has not met his initial burden of establishing that he did not create the condition, or had no notice thereof.

Even if defendant can be said to have made a *prima facie* showing of entitlement to relief, plaintiff's oral testimony is sufficient to raise issues of fact concerning whether and for how long the board had been installed and whether defendant was at the premises for a sufficient period of time, after the rain had stopped and before he left for work, for a trier of fact to conclude that he had either constructive or actual notice of the condition.

Here plaintiff's testimony shows more than the mere fact of wetness but also contains details and particulars as to times of day, duration of rain and permanence of the condition. *Cf Pinto v. Metropolitan Opera*, 61 AD3d 949 (2d Dept. 2009); *Medina v. Sears Roebuck and Co.*, 41 Ad3d 798 (2d Dept. 2007).

The defendant's motion for summary judgment therefore is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: August 20, 2009

HON. DANIEL PALMER
Acting Supreme Court Justice

ENTERED
AUG 24 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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