

Frenza v Montgomery Trading Co.

2009 NY Slip Op 32157(U)

September 21, 2009

Supreme Court, New York County

Docket Number: 105973/06

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 105973/2006

FRENZA, MICHAEL J.

INDEX NO. _____

vs

MONTGOMERY TRADING

MOTION DATE _____

Sequence Number : 003

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

_____ 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

FILED

Upon the foregoing papers, it is ordered that this motion

SEP 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

THE ACCOMPANYING MEMORANDUM DECISION.

Case ready for trial. serve decision on trial support

Dated: Sept 21, 2009

J. Gische
HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 10

-----X
MICHAEL J. FRENZA,

Plaintiff,

DECISION/ORDER

-against-

Index # 105973/06
Mot. Seq. # 003

MONTGOMERY TRADING CO., FGM 8TH REST.
CORP. d/b/a RUMOURS BAR LOUNGE & GRILL,
DYCKMAN'S FAMILY PROPERTIES, DYCKMAN'S
N.Y., LLC AND DYCKMAN'S REALTY, LLC,

Defendants.

-----X
Hon. Judith J. Gische

Pursuant to CPLR §2219(a) the following papers were considered by the Court in connection with this motion:

PAPERS	NUMBERED
Notice of Motion, JOF affirm., JH affd., exhibits.....	1
SPG affirm in opp., exhibits.....	2
MJF affd.....	3
JOF reply affirm.....	4
JOF supplemental reply affirm.....	5

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

Defendants Montgomery Trading Co. ("MTC"), and FGM 8th Rest. Corp. d/b/a Rumours Bar Lounge & Grill ("FGM") (collectively "defendants") move for summary judgment dismissing the complaint. Plaintiff opposes the motion.

By prior order of this Court dated August 4, 2008, named defendants Dyckman's Family Properties, Dyckman's N.Y., LLC and Dyckman's Realty, LLC, were dismissed from the case. Issue has been joined and this motion has been brought within 120 days of the filing of the Note of Issue. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004). Thus, the motion is properly before the Court at this time.

Arguments of the Parties

This action arises out of an accident that occurred when, on January 22, 2005, plaintiff fell down a flight of stairs at the premises located at 933 Eighth Avenue in Manhattan ("premises"). The premises were owned by MTC and leased to FGM, which operated a bar and lounge business therein.

Now that discovery has been completed, including the deposition of plaintiff, defendants primarily argue that plaintiff cannot establish how the accident happened and consequently he cannot satisfy his burden of proving that it was due to the negligence, if any, of defendants. In making this argument, defendants rely on plaintiff's deposition testimony that at the time of the fall he could not specifically identify what caused him to fall. They next argue that because there was a snow storm in progress at the time of the accident, there cannot be any finding of liability against defendants. They further argue that because plaintiff and his eye witness testified that they could see the interior stair case and there are no violations of the Building Code, there must be a finding, as a matter of law, that the stairs were properly illuminated. Finally they argue that MTC is an out of possession landlord, who neither created nor had a right to re-enter and correct any alleged defect at the premises. As such MTC argues that, as a matter of law, it is not responsible for the accident.

In opposition, plaintiff claims that there are numerous issues of fact about whether defendants' actions were negligent and whether such negligence caused plaintiff to slip and fall down the stairs. They maintain that such factual disputes include the condition of the stair tread and that there was a wet and slippery substance observed on the stairs immediately after plaintiff fell and that FGM employees had been using the stairs to bring dirty, wet dishes from the lounge space to the kitchen all evening. Plaintiff claims that the

storm in progress doctrine has no application to the facts of this case. Plaintiff further argues that there are issues of fact about whether the stairwell was sufficiently lighted for him to have seen and avoided the dangerous conditions on the stairs. In making these arguments plaintiff not only relies upon his own deposition testimony and that of an eye witness, but he has also proffered the affidavit of an expert, who inspected the premises shortly after the accident.

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). This showing may include direct as well as circumstantial evidence. Gurfein Bros., Inc. v. Hanover Ins. Co., 248 AD2d 227 (1st dept. 1998); Robinson v. Robert Bosch Power Tool Corp., 221 AD2d 177 (1st dept. 1995). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

At the outset the Court rejects defendants' argument that the storm in progress doctrine has any application to the case at hand. While there was testimony that it was snowing outside at the time of the accident, there is no evidence (provided by either party to this action) that the conditions on the interior stairway where plaintiff fell were the result of water that was tracked in from the outside. Nor does plaintiff advance any theory of liability that relies upon a property owner's obligation to clear snow and ice from the

premises. Plaintiff claims that the slippery condition of the stairs was due to FGM's employee transporting a bucket of dirty dishes, etc. from the lounge to the kitchen on the floor below shortly before plaintiff fell. There is no dispute that the stairway was an interior one, to the rear of the premises. The storm in progress doctrine is a defense which provides that while a snow storm is actually in progress, the obligation of a person in control of property to remove such snow, is suspended until a reasonable time after the storm has ended. Espinell v. Dickson, 57 A.D.3d 252, 253 [1st Dept 2008] (*citing Pippo v. City of New York*, 43 A.D.3d 303, 304 [1st Dept 2007]; *also Hilsman v. Sarwil Associates*, 13 AD3d 692 (3rd dept. 2004). Since there is no claim and no evidence that the wet conditions on the stairway were the result of snow, any defense suspending the obligation to remove snow until a reasonable time after the storm has ended is simply irrelevant.

Defendants claim that because plaintiff does not know how the accident occurred, he cannot establish that the conditions on the stairway actually caused his accident.

At his deposition, plaintiff testified that after being directed to the restroom located at the bottom of stairwell in the rear of the premises, he began to descend. Plaintiff fell when he reached the third step and he ultimately landed at the "bottom of the stairs." (Pl. ebt pp.36, 45). When asked if his foot tripped or slipped, he answered, "I don't know if it slipped or – I don't know what happened. I put my foot on the step and I fell." (Pl. ebt p.40). When asked "Do you know what caused your fall?", plaintiff answered, "No." (Pl. ebt p. 49). When asked if his foot slipped or did it strike something, plaintiff answered, "I'm not sure." (Pl. ebt p. 109). When asked if he could feel what happened to his foot before he fell, plaintiff answered, "It happened so fast I couldn't tell you. I don't know

whether I slipped on it or tripped on it." (Pl. ebt p.109).

Defendants argue that this testimony makes it clear that plaintiff is unable to identify what, if anything caused his fall.

Defendant's further argue that testimony by both plaintiff and his friend with him at the time that they could see the bottom of the staircase, warrant a finding, as a matter of law, that the stairwell was properly illuminated and the lack thereof did not cause plaintiff to fall.

In opposition, plaintiff claims that there is sufficient evidence to establish that plaintiff's fall was caused by a worn, cracked and missing tread on the second step of the staircase which failed to provide secure footing and that the poor lighting in the stairwell prevented him from noticing the defective condition. The observations of the condition of the stairwell are supported by plaintiff's deposition testimony, pictures of the stairwell, corroborating testimony of eyewitness (and plaintiff's friend) Edward Hayes and the observations of Daniel S. Burdett, a professional engineer hired by plaintiff who inspected the premises within a month of the accident. All of these sources cross-confirm the following information: The stairs were covered with a rubber tread mat that was missing, cracked or broken on many steps, including the second step. Although plaintiff testified he fell on the "third" step; he identified on a photograph the second step as being the place where he first began to fall. The steps were coated in black and Mr. Hayes described them as steep.

Notwithstanding that plaintiff and Edward Hayes testified that they could see the stairs, they both also testified that the lighting was dim and dark. The poor lighting and the dark mats made it difficult to distinguish one tread from the other or even the condition of the treads.

Both plaintiff and Mr. Hayes testified that they observed a bus boy taking a bucket full of dirty dishes down the stairs to the kitchen before plaintiff fell. Plaintiff testified that shortly after the fall he observed both his hands and pants were wet and greasy. He also observed that the stairs themselves had a greasy substance on them.

Assuming that the deposition testimony relied upon by defendants satisfies their burden of making a prima facie case in favor of summary judgment, plaintiff has produced sufficient evidence in opposition to the motion that identifies disputed issues of fact concerning defendants' negligence and the cause of his fall. That plaintiff could not identify the specific cause of his fall at the time it occurred is not fatal to his case. There is sufficient collateral and circumstantial evidence from which a jury could conclude that his fall was caused by defective worn condition of the stairwell tread, the wet and greasy conditions of the stairway and lighting that made the defective conditions in the stairway difficult to avoid. In this regard, when a case is based upon circumstantial evidence, the Court of Appeals has held that: "it is enough that plaintiff shows facts and conditions from which the negligence of defendant and the causation of the accident by that negligence may be reasonably inferred. The law does not require that plaintiff's proof positively exclude every other possible cause of the accident by defendant's negligence. " Schneider v. Kings Highway Hospital Center, 67 NY2d 743 (1986)(citations omitted).

The cases relied upon by defendant are distinguishable. In Telfyan v. City of New York (40 AD3d 372 [1st dept. 2007]), not only was the plaintiff unable to testify as to the alleged defect that caused her to fall, but she did not offer any other evidence until re-argument of a summary judgment. Likewise, in Pluhar v. Town of Southampton (23 AD3d 975 [2nd dept. 2006]), summary judgment was warranted because there was no evidence of causation, including no testimony by the plaintiff herself. At bar, plaintiff has

offered evidence both during discovery and on this motion that explain the confluence of circumstances that caused him to slip and fall down a flight of stairs. See: Voyd v. 8th Avenue Discount Liquors, Inc., 2009 WL 1725821 (NY Sup. NY Co.).

Defendants argue that because the lighting provided was that which was required under the Building Code and further because the plaintiff testified that he saw the stairs, there can be no finding of negligence related to the lighting in the stairwell. Certainly, the plaintiff's expert does not opine that the lighting provided in the stairwell violated the Building Code. Plaintiff's argument, however, is not strictly based on the lighting in and of itself. He claims that the stairwell was dark and so were the mats covering the stairs, making each stair visually indistinguishable from the other. This is an issue that should be presented to the jury.

Defendants finally argue that at the very least, MTC, the owner of the premises, is not legally responsible for the conditions claimed in the stairway. For the reasons set forth below, the case against MTC is dismissed.

In general, a landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 AD2d 402 (1st dept 2001). Where a landlord is out of possession, however, the landlord is generally not liable in negligence with respect to the condition of the demised property. Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 569 (1987); Vasquez v. The Rector, 40 AD3d 265, 266 (1st Dept 2007); Johnson v. Urena Serv. Ctr., 227 AD2d 325, 326 (1st Dept 1995) *lv denied* 88 NY2d 814 (1996). There are two exceptions to this general rule. One exception is where the landlord is contractually obligated under the lease to make repairs or maintain the premises. Another exception is where the landlord has a contractual right under the

lease to reenter, inspect and make needed repairs to the premises. Lane v. Fisher Park Lane Co., 276 A.D.2d 136 (1st Dept 2000).

Defendants have produced the lease between MTC and FGM. Under the lease MTC was not contractually obligated to maintain the premises or make repairs. MTC did not create the allegedly defective condition, nor did it have prior notice of such condition and/or a right of re-entry to correct such condition. Under the circumstances of this cases, there is no basis to charge MTC with responsibility for this accident.

Conclusion

In accordance herewith it is hereby:

FILED

SEP 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

ORDERED that defendants motion for summary judgment is granted only to the extent that the complaint against Montgomery Trading Co., is severed and dismissed; in all other respects the motion for summary judgment is denied, and it is further

ORDERED that the Clerk of the Court is directed to enter a judgment in favor of defendant Montgomery Trading Co., against plaintiff Michael J. Frenza dismissing this action with prejudice, and it is further

ORDERED that this decision shall be served upon the clerk in trial support so that the remaining claims can be scheduled for trial; and it is further

ORDERED that any requested relief not otherwise granted herein is denied; and this constitutes the decision and order of the Court.

Dated: New York, New York
September 21, 2009

SO ORDERED:

J.G. J.S.C. 