

Sangiorgio v Bajan Corp.

2009 NY Slip Op 32434(U)

October 5, 2009

Supreme Court, Nassau County

Docket Number: 15813/07

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**ALBERTO SANGIORGIO, an infant under
the age of 15 years by his Mother and
natural Guardian MIGUELINA PEREZ and
MIGUELINA PEREZ individually,**

**Motion Sequence #1
Submitted July 28, 2009**

Plaintiff,

-against-

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BAJAN CORP.,

Defendant.

The following papers were read on this motion:

Defendant's Notice of Motion.....	1
Memorandum of Law in Support.....	2
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Requested Relief

Defendant BAJAN CORP. (hereinafter referred to as "BAJAN"), moves for an order, pursuant to CPLR § 3212, granting defendant summary judgment dismissing the plaintiffs' complaint against the defendant on the ground that BAJAN did not create the defect nor have notice of the defect, which was trivial in nature. Counsel for plaintiffs, ALBERTO SANGIORGIO, an infant under the age of 15 years by his mother and

natural guardian, MIGUELINA PEREZ, and MIGUELINA PEREZ individually, opposes the motion, which is determined as follows:

Background

This action arises from a trip and fall accident that occurred on May 17, 2007, at the building located at 75 Graffing Place, Freeport, New York, that is owned by BAJAN. It is alleged that, on said date, ALBERTO SANGIORGIO tripped and fell when his foot made contact with the metal edge of a step at the building where SANGIORGIO and his mother, MIGUELINA PEREZ, were living with her sister, on the staircase located between the ground floor landing and their second floor apartment. The plaintiffs commenced the action on August 27, 2007 with the filing of a summons and complaint and, after issue was joined, interposed verified bill of particulars that alleged negligence on the part of the defendant: by permitting a dangerous defective and hazardous condition; by causing and allowing a trap to exist; by failing to maintain the premises in a reasonably safe and proper condition; and by causing or permitting an obstruction to plaintiffs' safe passageway to exist and in failing to provide plaintiff with safe and proper ingress and egress to the premises.

On the instant motion, counsel for defendant asserts that, because there were no prior accidents on the stairway and no prior complaints, there was no notice to BAJAN of the alleged defect which, photographs confirm was trivial in nature. Defendant submits the deposition transcript of SANGIORGIO which reflects that the accident occurred between 4:00 and 6:00 P.M. after he walked home from school following his release at 2:20 P.M. He testified that, at the time of the accident, he was descending

the stairs from the apartment where he lived with his Aunt, was holding on to the railing on the left side, and tripped on the metal edge on the second step down from the second floor when the metal edge moved approximately 1 centimeter from the step. Counsel for defendant states that SANGIORGIO claimed that the entire strip moved when he put his foot down, though it had never happened before.

Counsel for defendant states that, at her deposition, his mother MIGUELINA PEREZ, testified in similar fashion that she did not know of any defect on the stairs, that no one had made any complaints about the stairs before, and that she did not know of any accidents on the steps in the building.

The building manager, Margarito Rivera, testified that she visits the building once per week, that she had no recollection of replacing any metal strips on the stairs, that the metal edge on the steps is to cover the frame, and that she had never been consulted with respect to repairs on the stairs.

Moving counsel argues that BAJAN did not have actual or constructive notice of the alleged defective metal strip and is, therefore, entitled to summary judgment. Additionally, it contends that the evidence shows, as a matter of law, that the condition is a non-actionable trivial defect that has no characteristics of a trap or snare and that dismissal is warranted.

In opposition to the motion, counsel for plaintiffs point out that SANGIORGIO testified at his deposition that the strip on the edge of the steps had moved before the day of the accident, when he would buy heavy things at the supermarket and he would walk hard on the steps. He also stated that he observed the superintendent mop the

floors on the staircase. Additionally, his mother testified that she would sometimes see the superintendent fixing things on the steps and that he would hit the metal with a hammer. Moreover, counsel for plaintiffs points out that the building manager testified that she kept no records of what the superintendent repaired at the building; that she had no computer or files and would write notes on pieces of paper and, "when its done", she would throw the paper out. Counsel for plaintiff urges that there are questions of fact with respect to whether defendant had notice of the defect in the metal stair strips, and that plaintiffs are entitled to a favorable interpretation of the facts as outlined in the transcripts. Counsel argues that the buildings superintendent had ample opportunity to observe the defect on the steps because he often mopped the stairs and was observed striking the metal strip with a hammer on two (2) of three (3) occasions. Moreover, counsel for plaintiffs points out that no testimony was elicited with respect to the extent that the strip moved and the issue of triviality cannot be determined as a matter of law.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]). Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532,

736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 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, 529 NYS2d 134 [2nd Dept. 1988]).

In an action for negligence, the law provides that a defendant is not an insurer, and negligence may not be inferred solely from the happening of an accident, but rather claimant must prove that the defendant breached a duty of care owed to claimant and

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that the breach of duty proximately caused the claimant's injury. *Valentine v State of New York*, 192 Misc. 2nd 706, 747 NYS2d 282 (Court of Claims, 2002). *Patrick v Bally's Total Fitness*, 292 AD2d 433, 739 NYS2d 186 (2nd Dept. 2002), instructs that, while the owner or possessor of property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a "dangerous condition" on the property, liability attaches to the owner or possessor only if the owner possessor created the condition or had actual knowledge or constructive notice of it, and a reasonable time to remedy it. 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 defendant's employees to discover and remedy it". *Gordon v American Museum of Natural History*, 67 NY2d 835, 501 NYS2d 646, 492 NE2d 774 (C.A. 1986).

"A defendant who moves for summary judgment in a [trip]-and-fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Soto-Lopez v Bd. of Mgrs. of Crescent Tower Condo.*, 44 AD3d 846, 843 NYS2d 444 (2nd Dept. 2007). While the Court may grant summary judgment if the defect is trivial, the Court considers "the appearance of the alleged defect and the other relevant circumstances of the accident." *Mendez v De Milo*, 17 AD3d 328, 792 NYS2d 600 (2nd Dept. 2005).

"[A] property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes or trip." *Hargrove v Baltic Estates*, 278 AD2d 278, 717 NYS2d 320 (2d Dept.

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2000). In *Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615, 688 NE2d 489 (C.A. 1997), the Court of Appeals held that whether a defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. See also, *Riser v New York City Hous. Auth.*, 260 AD2d 564, 688 NYS2d 645 (2d Dept. 1999). However, [e]ven a trivial defect can sometimes have the characteristics of a snare or trap". *Defazio v Hage*, 272 AD2d 964, 708 NYS2d 657 (4th Dept. 2000).

Discussion

After a careful reading of the submissions herein, it is the judgment of the Court that defendants have not made a *prima facie* showing of entitlement to summary judgment as a matter of law. Moreover, even if defendants had satisfied their burden, it is the judgment of the Court that plaintiffs have raised questions of fact as to whether defendants had actual or constructive notice of the alleged defective condition and whether the loose and moving metal stair strip constituted a trap for which defendant can be held liable. It is well settled that credibility issues are to be left for the trier of facts. *Seltzer v Razzi*, 6 Misc.3d 1002A, 800 NYS2d 357 (Civil Ct. NY 2004); *People v Govan*, 127 AD2d 690, 511 NYS2d 680 (2nd Dept. 1987).

Conclusion

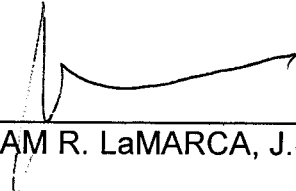
Based on the foregoing, it is hereby

ORDERED, that defendant's motion for an order granting summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 5, 2009



WILLIAM R. LaMARCA, J.S.C.

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ENTERED

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