

Gray v Reckson 1185 Ave. of the Americas LLC

2009 NY Slip Op 32822(U)

November 27, 2009

Supreme Court, New York County

Docket Number: 107397/07

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

Index Number : 107397/2007

GRAY, GEORGE

VS.

RECKSON 1185 AVENUE

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

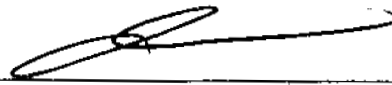
Upon the foregoing papers, It is ordered that this motion *by defendant Bank of America for summary judgment is granted in accordance with the attached memorandum decision. (motion consolidated and disposition with motion seq 004)*

FILED

DEC 03 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/27/09



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 PART 56

-----X
GEORGE GRAY,

Plaintiff,

-against-

RECKSON 1185 AVENUE OF THE AMERICAS
and BANK OF AMERICA,

Defendants.

FILED

DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

Index No.

107397/07

Motion Seq. No.:

003 & 004

DORIS LING-COHAN, J. :

Motion Sequence Numbers 003 and 004 shall be consolidated for disposition.

In Motion Sequence Number 003, defendant Bank of America (Bank) moves for summary judgment dismissing the complaint and defendant Reckson 1185 Avenue of the Americas's (Reckson) cross claims against it. In Motion Sequence Number 004, Reckson moves for summary judgment dismissing the complaint and the cross claim against it for contractual indemnification.

This is a personal injury action. On November 6, 2006, plaintiff, in the course of his maintenance work, sustained injuries when he fell on the stairway leading to the sub-basement at the premises located at 1185 Sixth Avenue, New York, New York. Reckson is the owner of the premises and Bank is a commercial tenant which leases and occupies several floors of the premises. Both defendants are being sued for negligence in maintaining worn, eroded, misleveled, slippery and defective steps on the stairway. Plaintiff served a bill of particulars and appeared for a deposition. Dennis O' Hara, an assistant chief engineer employed by Reckson, also appeared for a deposition. Plaintiff filed a note of issue on November 5, 2008.

Bank moves for summary judgment dismissing the complaint on the ground that it did not

create the defective condition on the stairway. Bank submits a lease between itself and Reckson, dated January 14, 1997, whereas Bank was to occupy the 2nd, 3rd and 16th floors of the premises. Pursuant to an amendment to the lease, dated April 22, 1999, Bank was permitted to occupy the 24th floor. The lease provides that Reckson, as landlord, would repair and maintain the public portions of the premises. The rider to the lease provides that:

Landlord shall indemnify tenant against any expense, loss or liability paid, suffered or incurred as a result of any breach by the landlord, agents, contractors, servants, employees or licensees or any covenant or condition of this Lease. Landlord shall indemnify, defend and hold tenant harmless from and against all claims and expenses for bodily injury or property damage occurring upon the public areas of the building project, except any claim which may be based upon the negligence of tenant.

Bank also submits the deposition testimony of Mr. O'Hara. Mr. O'Hara testified that the premises had a concourse level and a sub-basement, and that Bank had no access to the concourse or the sub-basement because these areas were not open to the general public, and were only accessible to building employees. He further stated that there were two stairways that led from the concourse level to the sub-basement; one was on the eastside and the other was on the westside and that the stairways had an identical number of steps. Mr. O'Hara averred that if there was a crack or defect on the stairway leading to the sub-basement, Reckson would fix it or have an outside contractor come in to fix it. Bank had no responsibility for the maintenance or repair of these stairways.

Bank claims that the evidence submitted proves that Bank had no legal duty concerning the maintenance or repair of the subject stairway. Therefore, Bank claims that it is entitled to summary judgment.

Reckson's answer contains four cross claims against Bank for: (1) contribution; (2)

common-law indemnity; (3) contractual indemnity; and (4) damages for failure to procure insurance pursuant to contract. Bank contends that it cannot be liable for contribution or indemnity because it is not liable for negligence. Bank argues that a review of the rider shows that Bank was merely required to maintain general liability insurance naming Reckson as an additional insured, concerning the use, occupancy and possession of the “demised premises” leased by Bank. Since the accident did not occur on property leased by Bank, Reckson allegedly has no viable claim for failure to procure insurance.

Bank’s answer includes a cross claim against Reckson for indemnification. Pursuant to Paragraph 51 (b) of the rider, Reckson is obligated to indemnify, defend and hold Bank harmless with respect to the suit brought by plaintiff against Bank. Bank seeks a hearing to determine the amount of defense fees and attorney’s fees that Reckson allegedly owes Bank.

There are no opposition papers in response to Bank’s motion for summary judgment.

“[T]he 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 demonstrate the absence of any material issues of fact.” *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993), quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion’s opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006).

Since there is no opposition to Bank’s motion, the court shall determine if this motion is sufficient on its own. This requires a showing that Bank has a prima facie right to judgment. The evidence submitted by Bank demonstrates that it did not have anything to do with the cracked condition in the stairway that is the cause of the accident. Bank has established that it

had no duty to maintain the stairway so that individuals such as plaintiff would not succumb to an accident. Therefore, Bank's unopposed motion for summary judgment is granted and this case is dismissed as to defendant Bank.

Reckson moves for summary judgment on the grounds that Reckson did not have notice of the alleged cracked condition on the stairway, and the condition is so trivial that it is not actionable. Reckson submits plaintiff's deposition testimony in which he states that the only cause of his fall was the depression of the stair and a half-inch raised metal edge. He testified that he did not know how long the stair had been in that condition. Plaintiff went to the scene of the accident about a month later with an investigator from his attorney's office to have a picture taken. He was shown one of the photos taken and circled where his foot came into contact with the edge of the step. That photo is submitted by Reckson. Reckson states that no discernable difference in height between the metal of the step and the step itself can be seen on the photo.

Reckson relies on Mr. O'Hara's testimony, in which he believed that a fire safety director would inspect the stairs once a month. He did not see any entries in the security log book regarding any complaints about the condition of the stairway. When shown plaintiff's photo he indicated he could see no differentiation or space between the metal and the step and claimed that the stairway is in the same condition since the accident.

Reckson contends that the defect at bar is so trivial and unsubstantial that its motion should be granted, because trivial defects that are open and apparent, possessing none of the characteristics of a trap or hazard, do not support a cause of action. Reckson states that the photo makes it clear and apparent that the condition was too slight to be distinguishable.

Reckson also contends that since its employees did not have knowledge of the defect, was not aware of the condition prior to the accident, and did not hear complaints from other parties,

then Reckson could not have actual or constructive notice of the defect.

Plaintiff opposes Reckson's motion, claiming that there is an issue of fact as to the alleged danger of the defect. Plaintiff, at his deposition, testified that after the accident, he was informed by a security guard employed by Reckson that another worker was injured on the same area of the stairway as plaintiff, sometime before plaintiff's accident. Plaintiff claims that he circled the photo at bar to show the area of the defect.

With respect to Mr. O'Hara's testimony, plaintiff states that he confirmed plaintiff's testimony when he said that there is a steel edge to the steps and there was no difference in color between that steel edge and the step. Mr. O'Hara admitted that if he noticed any difference in height between the edge and the step, he would have made some repairs, because he believed that a difference in height between the steel edge and the step would be a tripping hazard.

Plaintiff argues that Reckson failed to submit testimony from anyone with first-hand knowledge of the condition of the step on the date of the accident other than plaintiff. Plaintiff contends that because of this, Reckson failed to sustain its initial burden on its motion. Alternatively, if the court decides that Reckson sustained its burden, then there is an issue of fact as to whether Reckson failed to maintain the stairway and whether the defect constituted a tripping hazard.

Bank also opposes Reckson's motion of summary judgment on similar grounds as plaintiff. Bank avers that Reckson has failed to set forth any evidence to warrant a dismissal of Bank's claim for contractual indemnification.

In reply, Reckson states that there is no evidence that the condition shown in the photograph had any depth or had anything to do with the raised metal edge in the middle of the step that plaintiff claims was the cause of the accident. Reckson argues that while the security

guard told plaintiff that someone had fallen on the same stairway on a prior occasion, this guard never clarified which step the accident occurred at. If this court finds the condition at bar to be a hazard, Reckson states that plaintiff has still not proved that Reckson caused the condition or had notice of its existence.

In order to prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition. *Cruceta v Funnel Equities, Inc.*, 18 AD3d 693 (2d Dept 2005). The issue of whether a dangerous or defective condition exists “depends on the particular facts and circumstances of each case.” See *Guerrieri v Summa*, 193 AD2d 647, 647 (2d Dept 1993). In determining whether a defect is trivial, “the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury [internal quotation marks and citation omitted].” *Ryan v KRT Property Holdings LLC*, 45 AD3d 663, 665 (2d Dept 2007). 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 toe or trip. *Joseph v Villages at Huntington Home Owners Associations, Inc.*, 39 AD3d 481, 482 (2d Dept 2007).

Reckson has stated that, even if there was a defective condition on the stairway, it did not have actual or constructive notice of the condition. Reckson contends that plaintiff cannot prove how long the alleged defect was present.

Based on the evidence submitted, there is no proof of any maintenance or repair attributable to the defect on the step at bar. Plaintiff’s argument that another person had an incident on the stairway at an earlier time is hearsay since it was based upon what a security guard told plaintiff when plaintiff testified. While hearsay which is otherwise excludable at trial

may be considered to deny a motion for summary judgment, where notice, either actual or constructive, is the issue, such notice must be proved through admissible evidence. *Monshine v Olympia and York Inc.*, 223 AD2d 507, 508 (1st Dept 1996).

Upon the submitted papers, there is insufficient proof to find an issue of fact as to whether Reckson had actual or constructive notice of the condition of the step. Therefore, Reckson is entitled to summary judgment. Since Reckson is not liable to plaintiff, then there is no claim for contractual indemnification.

Accordingly, it is

ORDERED that Bank's motion for summary judgment is granted, and the complaint and cross claims are dismissed as against Bank, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that Reckson's motion for summary judgment is granted, and the complaint and cross claim are dismissed as against Reckson, ad the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk is to enter judgment accordingly.

DATED:

11/27/09

DORIS LING-COHAN
J.S.C.

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

FILED

DEC 03 2009

NEW YORK
COUNTY CLERK'S OFFICE

J:\Summary Judgment\GRAY.reckson.wpd