Nathanson v BB&BB Mgt. Corp.
2010 NY Slip Op 32045(U)
August 2, 2010
Sup Ct, Orange County
Docket Number: 5554-2006
Judge: Lewis Jay Lubell
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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF ORANGE

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ARTHUR and DEBRA NATHANSON,

Plaintiff(s),

DECISION & ORDER

Index No. 5554-2006

-against -

BB&BB MANAGEMENT CORPORATION, ABJO REALTY CORP., ISRAEL EISDORFER, JOSEPH STRULOVICH and IRVING BAUDER, Individually,

Defendant(s).

----------X

LUBELL, J.

By Decision & Order of October 23, 2009, this Court granted defendant's motion for summary judgment dismissing the complaint in this personal injury action upon plaintiff's inability to identify the cause of his alleged fall. The Order was duly entered and filed in the Office of the Orange County Clerk. Thereafter, plaintiff served and filed a motion to reargue with this Court and a Notice of Appeal with the Appellate Division, Second Department.

In this Court's Decision & Order of March 23, 2010, the Court scheduled a date for a fact finding hearing to determine whether plaintiff had been served with a copy of the Court's Decision & Order of October 23, 2009 with notice of entry as is set forth in the November 11, 2009 Affidavit of Service of Ava Crockett or whether, as plaintiff argues, no such service was made and, as such, the thirty-day period set forth in CPLR §2221(d)(3) started to run from plaintiff's December 21, 2009 service of a copy of the Decision & Order with notice of entry upon defendant.

By Decision & Order on Motion of the Appellate Division, Second Department, dated March 22, 2010, the pending appeal was remitted to this Court to "hear and report on when the respondents [defendants] served the order dated October 23, 2009, with notice of entry on the appellants [plaintiffs] . . ."

Thereupon, a hearing was scheduled for June 30, 2010, at which

time the parties entered into a stipulation (the "Stipulation") which addresses, among other things, the factual issue to be determined by this Court pursuant to its Decision & Order of March 23, 2010 and upon remittal pursuant to the Decision and Order on Motion of the Appellate Division dated March 22, 2010.

The Stipulation reads as follows at pages 16 through 17 of the June 30, 2010 transcript:

> 1. On November 11, 2009, Babchik & Young, [attorneys for defendants], mailed a notice of entry of the decision and order October 23, 2009 and entered in the Orange County [C]lerk's Office on October 26, 2009[, by] placing said notice of entry, with a copy the order enclosed in a post-paid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service and properly addressed to the offices of Wingate Russotti and Shapiro at 420 Lexington Avenue, New York, New York 10170, 2750 [attorney for plaintiff].
>
> 2. The office of Wingate Russotti & Shapiro did not receive the said Order with notice of entry;
>
> 3. On December 21, 2009, the office of Wingate Russotti & Shapiro mailed notice of entry of the decision and order dated October 23, 2009 entered in the Orange County Clerks's Office on October 26, 2009 [b]y placing said Notice of Entry with a copy of the order enclosed in a post-paid, properly addressed wrapper in an official depository under the exclusive custody and care of the United States Postal Service and properly addressed to Babchik & Young, 200 East Post Road, White Plains, New York 10601; and
>
> 4. On or about December 28, 2009, Babchik & Young received a copy of the order with notice of entry that Wingate Russotti & Shapiro mailed on December 21, 2009.

In this Court's Report Upon Remittal to the Appellate Division, Second Department, dated July 14, 2010, the Court found:

> Upon the foregoing Stipulation, the Court hereby finds that "respondents [defendants] served the order dated October 23, 2009, with notice of entry on the appellants [plaintiffs]" on November 11,

2009, as is indicated in paragraph "1" of the June 30, 2010 Stipulation.

Now, based upon the Stipulation, this Court concludes that plaintiff's service of the subject papers by mail was deemed complete upon their deposit in the mail and, as such, enjoys the presumption of proper mailing to the addressee, the defendant (Vita v. Heller, 97 A.D.2d 464, 464-465 [2d Dept., 1983] citing CPLR 2103, subd [b], par 2; A & B Serv. Sta. v State of New York, 50 A.D.2d 973, mot for lv to app den 39 N.Y.2d 709). In response and by way of stipulated fact, defendant has not only come forward with evidence sufficient to overcome the presumption of proper mailing such as would warrant a hearing in the first instance, but has also established non-receipt.

Having established by way of stipulated fact the non-receipt of the subject order with Notice of Entry and there being no showing that plaintiff was otherwise aware of the paper's existence and contents, the Court finds that plaintiff's failure to have timely moved for reargument before this Court as calculated from defendants' November 11, 2009 deposit in the mail of the order with Notice of Entry is excused (Sport-O-Rama Health & Fitness Center, Inc. v. Centennial Leasing Corp., 100 A.D.2d 584, [2d Dept., 1984].

As such, and there being no contention to the contrary, the motion to reargue is timely as measured from plaintiff's December 21, 2009, service upon defendant of notice of entry of the Decision and Order dated October 23, 2009.

Upon that finding, the Court will now proceed to a determination of the motion to reargue.

Defendant's motion to reargue is granted, the Court being satisfied that, at least as a matter of discretion, if not law, the Court should more particularly address, upon reargument, the issue raised with regards to the absence of a handrail on the landing from which plaintiff fell.

Upon reargument, the Court now rules as follows.

Plaintiff Arthur Nathanson brings this personal injury action in connection with injuries sustained on November 4, 2005 when he fell from a stairway platform located outside of a warehouse which he leased from defendant Abjo Realty, its owner and manager. The stairway platform, which is elevated approximately nineteen inches above grade, lacks any protective guardrail or handrail around its 47 inch wide by 36 inch deep rectangular perimeter and lacks any handrails or banisters on either side of its steps.

Defendants move for summary judgment upon the grounds that plaintiff is unable to identify the cause of his alleged fall and,

by way of expert proof, that the lack of a guard or railing on the stairs or the landing is not violative of any code or regulation.

With respect to the plaintiff's deposition testimony, defendants note that plaintiff testified that immediately prior to his fall: (1) he was standing on the platform with another adult male; (2) his feet may have been hanging off the side of the platform but he could not "be specific about where I fell from"; and (3) he was talking to the other individual and rejoicing (about having put in a full day of work following a serious illness) by "flailing" his hands, feet and neck, after which he fell. He further testified that his ankle rolled, he hit his head and ended up on the ground.

More specifically, plaintiff's deposition testimony includes the following quotation at page 103, lines 23 through 25: "I know I had an inversion and I hit my head and I had an inversion on my left ankle. How it happened, I don't know."

Other notable citations to plaintiff's deposition testimony include:

Page 98, lines 10 - 15:

> Q. Can you tell me where on that top step your feet were as you were closing the door?
>
> A. I can't really tell you that.
>
> Q. Was any part of your foot extended over the side of the step?
>
> A. I don't think so. No.

Page 105, line 22 through page 106, line 23.

> Q. Are you standing looking straight across the platform, across the width of the platform, or standing at an angle of some kind, or do you recall?
>
> A. I don't know what happened.
>
> Q. Do you recall if any part of your left foot was hanging off the side of this platform at the time your ankle rolled over?
>
> A. I don't think my ankle was hanging off of it, but I don't know. I just don't know. All I know is that I had an inversion. I fell, I hit my head. I heard

it hit my head. And I ended up on the floor semi-conscience, in pain, seeing stars.

. . .

Q . . . I need to know where you were facing and how you were standing.

A. Don't have that answer for you, sir.

Page 163, line 8 through page 164, line 6:

Q. Just a quick reference back to Defendants' Exhibit 5 from June 5, 2008, do you know as you sit here today at what point in time did your left foot come into contact with the crack that is demonstrated in the right hand picture furthest away from the exhibit tab?

. . .

A. I can't be specific about where I fell from, all I know is I fell.

Q. But do you know as you sit here today whether this crack had any connection to your ankle rolling over and you falling?

A. Nope.

Immediately thereafter, plaintiff's counsel had a private conversation with plaintiff. This testimony immediately followed at page 164, line 15 through page 165, line 21.

Plaintiff's counsel: Could we hear the last question and answer, please?

(The requested testimony was read back by the Court Reporter.)

Plaintiff's counsel: That was specifically this crack, right? And your answer was no. Do you want to keep that answer?

. . .

THE WITNESS: I want to amend my answer to I don't know if it was this crack, okay, or it was just rubble, or it was no banister but something on that platform caused me to fall.

. . .

> A. I know that I felt something that was not level that made my foot invert and I feel because of either this rubble or this crack and no banister. That's my answer and you are not going to change it.

Continuing at page 167, line 9 through page 168, line 5:

> Q. What leads you to believe that the crack that you see on the platform may have led to your fall?
>
> A. Because I felt something give my foot way. I felt rubble there. I felt unevenness in my step that made me fall. Could it have been this rubble that was there? Yes, because that crack [sic] too from all of the water damage. This was caused by water damage.
>
> . . .
>
> Q. What leads you to believe the rubble may have caused you to fall?
>
> A. Because I felt the sensation on my foot that turned my foot inverted. Something made it all, whether the rubble or the crack is impossible for me to know. But I reached out as I fell and hit my head and if there was a bannister I wouldn't have fallen.

As to the lack of any code violation, defendants have come forward with the affidavit of Herbert Weinstein. P.E., who opines that the subject landing and steps do not violate the provisions of what he contends is the applicable section of the New York State Building Code, May 2002 edition, since the landing is less than thirty inches high. Mr. Weinstein takes the position that the section of the code upon which plaintiff relies is inapplicable since they do not relate to a commercial premises, such as is present here.

The Court finds that, in the first instance, that defendants have come forward with a prima facie showing of entitlement to judgment in their favor as a matter of law. More specifically, based upon, among other things, the deposition testimony cited herein, the Court concludes that plaintiff cannot identify the cause of his mishap and his attempt to do so, even after a questionable effort at rehabilitation through counsel, still leads to nothing more than mere speculation (see, Pluhar v. Town of Southampton, 29 A.D.3d 975 [2d Dept., 2006] citing Oettinger v Amerada Hess Corp., 15 A.D.3d 638, 639 [2d Dept., 2005][inability to identify the cause of fall is fatal to her claim]; Hartman v

Mountain Val. Brew Pub, 301 A.D.2d 570 [2d Dept., 2003]; Visconti v 110 Huntington Assoc., 272 A.D.2d 320, 321 [2d Dept., 2000]; Gordon v American Museum of Natural History, 67 N.Y.2d 836, 837 [1986][absent evidence of causation, plaintiff cannot establish that the slippery condition was created by defendants, or that they knew or should have known of its existence]; Williams v Hannaford Bros. Co., 274 A.D.2d 649, 650 [2d Dept., 2000]; Visconti v 110 Huntington Assoc., 272 A.D2d 320, 321][mere speculation as to cause of a fall is insufficient]; Novoni v La Parma Corp., 278 A.D.2d 393 [2d Dept., 2000]).

Even if such a deficiency is not, in and of itself, enough to warrant the dismissal of this action (see, Antonia v. Srour, 69 A.D.3d 666 [2d Dept., 2010][even if fall is precipitated by a misstep, where there is testimony that injured party reached out to try to stop his or her fall, there is an issue of fact regarding whether the absence of a handrail was a proximate cause of the injury]), defendants have come forward with sufficient proof in admissible form through its expert submission that the building code does not require a guardrail around the open portions of the landing from which plaintiff fell or otherwise.

While in response to defendants' showing of entitlement to judgment in their favor as a matter of law, plaintiff has failed to raise any question of fact as to plaintiff's inability to identify the cause of his fall, plaintiff has come forward with a sufficient showing that there are questions regarding the applicability of the building code section upon which defendants rely and, thus, whether the absence of a guardrail constitutes a building code violation.

Although the Court recognizes that it is it's role to determine the applicability of the building code, as compared to resolving questions of fact as to whether a party's particular conduct is violative of same (Nielsen v. City of New York, 38 A.D.2d 592 [2d Dept., 1971] app dismissed 30 N.Y.2d 568 [1972]), the Court cannot make that determination from the papers currently before it, without, at the very least, oral argument thereon, if not an evidentiary hearing.

Therefore, oral argument and/or a conference will be conducted to address that limited issue.

Absent a finding that there exists an applicable code provision requiring a railing or guardrail on the landing, defendants' motion will be granted.

Therefore, based upon the foregoing, it is hereby

ORDERED, that the motion to reargue is hereby granted; and, it is further

ORDERED, that, upon reargument, the Court vacates it Decision & Order of October 23, 2009, granting summary judgment in favor of defendants and against plaintiff and, in its stead, denies summary

judgment for the reasons and to the extent herein stated; and, it is further

ORDERED, that the parties are directed to appear before the Court at 9:00 A.M. on August 31, 2010 to address the threshold issue as to whether the subject landing was in violation of any applicable building code on the date of occurrence, as plaintiff alleged or whether it was free of same, as defendant alleges.

The foregoing constitutes this Court's Report Upon Remittal.

Dated: Goshen, New York
August 2, 2010

S/_____
HON. LEWIS J. LUBELL, J.S.C.

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