

Park v Corrigan

2010 NY Slip Op 32518(U)

August 19, 2010

Supreme Court, Queens County

Docket Number: 18594/07

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
JANE PARK,

Plaintiff,

-against-

Index No.: 18594/07
Motion Date: 6/16/10
Motion Cal. No.: 19
Motion Seq. No.: 2

EDWARD M. CORRIGAN and KATHLEEN A.
CORRIGAN,

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendants Edward M. Corrigan and Kathleen A. Corrigan for an order, pursuant to CPLR §3212 in that no triable issues of facts exist, and/or dismissing the plaintiff’s complaint, pursuant to CPLR §3211(a)(7), in that such fails to state a cause of action against defendants.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Exhibits.....	6 - 10
Reply Affidavit.....	11 - 12

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is a personal injury action commenced by Jane Park (“plaintiff”) against Edward M. Corrigan and Kathleen A. Corrigan (“defendants”), the owners of property located at 652-31 74th Street, Elmhurst, New York, in which plaintiff rented the second floor apartment. Plaintiff alleges that she sustained injury on January 25, 2007, when, as she was walking barefooted on the wood landing leading from her living room to her bedroom, she slipped with her left foot, lost her balance on the floor board closest to the steps and fell down the steps of the interior stairway leading to her apartment. Plaintiff alleges that she fell because, inter alia, of inadequate lighting, the absence of handrails, and the failure to separate her apartment from the top of the staircase. Defendants move for summary judgment dismissing the complaint, alleging that they bear no liability for the happening of plaintiff’s accident.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position. See, Zuckerman v. City of New York, *supra*.

“To impose liability on a defendant for a slip and fall on an allegedly dangerous condition on a floor, there must be evidence that the dangerous condition existed and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time (see Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774; Moody v. Woolworth Co., 288 A.D.2d 446, 732 N.Y.S.2d 645).” Davis v. Rochdale Village, Inc., 63 A.D.3d 870, 870-871 (2nd Dept. 2009). A “defendant who moves for summary judgment in a slip-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 (citations omitted).” Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2nd Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2nd Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2nd Dept.2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept.1999). “Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice.” Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000); see, also, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2nd Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2nd Dept. 2003); O’Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2nd Dept. 2002). “To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant’s to discover and remedy it.” Green v. City of New York, 34 A.D.3d 528, 529 (2nd Dept. 2006); see, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Evenco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept.1996). In order to prevail on their motion for summary judgment in this action involving a fall upon an allegedly defective stairway, the defendants were “required to establish as a matter of law that they maintained the property in question in a reasonably safe condition and that they neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof” (citations and internal quotations omitted).” Andrini v. Navarra, 49 A.D.3d 575 (2nd Dept. 2008); Gleason v. City of New York, 68 A.D.3d 1054 (2nd Dept. 2009).

Moreover, it is equally well recognized that “[a] landowner [] is charged with the duty of providing safe means of ingress and egress, which includes a duty to provide adequate lighting’ (citations omitted).” Tarrazi v. 2025 Richmond Ave. Associates, 296 A.D.2d 542 (2nd Dept. 2002); *see, also*, Savage v. Desantis, 56 A.D.3d 1013 (3rd Dept. 2008). To establish a prima facie entitlement to summary judgment, the defendant is required to proffer evidence that the lighting was adequate, or if inadequate, that such inadequate lighting was neither a proximate cause of the accident nor was it a condition that the defendant created or of which the defendant had actual or constructive notice. *See*, Gestetner v. Teitelbaum, 52 A.D.3d 778 (2nd Dept. 2008); Swerdlow v. WSK Properties Corp., 5 A.D.3d 587 (2nd Dept. 2004); Streit v. DTUT, 302 A.D.2d 450 (2nd Dept. 2003); Goldfarb v. Kzichevsky, 280 A.D.2d 583 (2nd Dept. 2001); Rivas v. Waldbaums Supermarket, Inc., 247 A.D.2d 600, 600-601 (2nd Dept. 1998). Finally, pursuant to New York City Code § 27-375(f), entitled “Guards and handrails,” “Stairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only. Handrails shall provide a finger clearance of one and one-half inches, and shall project not more than three and one-half inches into the required stair width.”

In support of the motion for summary judgment, defendants proffered their and plaintiff’s deposition testimony, as well as an affidavit of merit of Robert L. Grunes, Ph.D., P.E., defendants’ expert Professional Engineer. Plaintiff, who moved into the second floor apartment on in May 2003, described the configuration of the entry way to her second floor apartment in the two-family home where she resided, stating, in substance, that after entry to the home, a hallway leads to the door to the staircase leading to her apartment, which consists of three steps, a landing (where the stairway turns to the left) and then eight more steps to the living area of her apartment. She also testified that there is a handrail on the left side of the stairway, and that the lighting is above the first three steps, with two switches at the top of the staircase for the light over the staircase and the light for the living room. She also testified that the staircase is carpeted, but the living room at the top of the stairway covered with wood flooring. Plaintiff further testified that on the evening of the accident, she took the garbage out after dinner, which required her to turn the stairway light on; she turned the light off “[i]mmediately upon coming back from taking out the garbage,” at approximately 10:30 p.m. Thereafter, she testified that she watched television in the living room while she talked on the telephone, then, with the intention of going to bed, she hung up the telephone, “turned off using the switch the light, and then it was dark and I stepped forward and slipped and fell down, stair.” At the time of her fall, plaintiff testified that she was barefooted, that the floor was slippery and that although her mother comes from Manhattan once a week to clean, including set mopping the living room floor, cleaning had last occurred four days before her accident. She further testified that the floor had been slippery since she moved into the apartment, and that her mother “used hand mop, water hand mop “ to make “not slippery. She also testified that the floor was slippery “when [she] was wearing socks,” and that she never complained about the slippery condition or the handrail to defendants. Plaintiff also testified that in 2005 90r 2006 she had a conversation with Mr. Corrigan about putting a door at the top of the stairway.

Defendant Edward Corrigan testified that he owns the two-family house where plaintiff resided, and that he was responsible for general maintenance, and that plaintiff would call him if there was any problem that needed to be fixed; however, he never received any complaints concerning the lighting, the wood floor or putting a hand rail on the other side of the staircase. Defendant Kathleen Corrigan testified to the same effect. Dr. Grunes, defendants' expert, set forth in his affidavit:

As a consequence of my inspection of the premises and review of the deposition testimony transcripts and voluminous discovery materials exchanged between the parties of this action, I have determined with a reasonable degree of engineering certainty that: 1) the static coefficient of sliding friction for the wood floor was reasonable and proper; 2) the low illumination level at the time of the accident, with minor visibility, was a direct result of the intentional power shut off at the switch plate by plaintiff; 3) the violations purported by the plaintiff's expert are either inapplicable or non-relevant; 4) the subject switch plate location was reasonable and proper; 5) there is no requirement that the top of the stairway be guarded; and 6) the accident account by plaintiff was inconsistent with the claimed consequences.

He further opined that applied the sections of the New York City Building Code relied upon by plaintiff's expert, were drawn from a post 1985 edition, not from the Code in effect in 1950, that would be applicable.

The evidence submitted by defendants was sufficient to make a prima facie showing of their entitlement to summary judgment by demonstrating, through the affidavit of their expert, that they maintained their property in a reasonably safe manner, and by showing that the accident occurred not because of any alleged defect either created by them or of which they had either actual or constructive notice, including lighting, the wooden floor or the handrail, that caused plaintiff's accident. Plaintiff conceded in her testimony that she made no complaints defendants regarding the adequacy of the lighting or handrail or condition of the wood floor during her approximately four year tenancy prior to the happening of the accident. Indeed, plaintiff's own testimony established that the accident occurred when she, while barefooted, lost her balance and fell off the edge of the wooden floor down the stairs, after she had extinguished the living room light in preparation for her going into her bedroom.. Her testimony further established that the floor was slippery only when she was wearing socks, and that her mother sought to eliminate the slipperiness by weekly mopping the floor with a wet mop. In any event, "in the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence." Mroz v. Ella Corp., 262 A.D.2d 465, 466 (2nd Dept. 1999); Kociecki v. EOP-Midtown Properties, LLC, 66 A.D.3d 967 (2nd Dept. 2009).

“Where the moving party has established prima facie that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion, or speculation’ (Leggio v. Gearhart, 294 A.D.2d 543, 544, 743 N.Y.S.2d 135; see Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).” Fotiatis v. Cambridge Hall Tenants Corp., 70 A.D.3d 631 (2nd Dept. 2010). Here, plaintiff failed to demonstrate the existence of a triable issue of fact. In opposition to the motion, plaintiff submitted, inter alia, her own affidavit and the affidavit of an expert witness, Herbert W. Baustein, P.D., who opined, in pertinent part, that the defendants’ “failure to repair and maintain the landing above the staircase, lighting and hand rail was a proximate cause of the accident.” This opinion was based upon his contention that each of the alleged defects – landing above the staircase, lighting and hand rail–violated provisions of section 27 of the New York City Building Code, the inapplicability of which were not refuted. However, even if the stairway and handrail were defective, as the expert opined, his conclusion linking the alleged defects to the plaintiff’s fall was purely speculative and conjecture, since plaintiff alleged, in her affidavit, that she “was on the edge of the wooden floor of the living room when I slipped and fell down the stairs,” and in her deposition testimony that she fell because her left foot slipped and caused her to lose her balance. See, Ghany v. Hossain, 65 A.D.3d 517 (2nd Dept. 2009); Rochford v. City of Yonkers, 12 A.D.3d 433, 433-434 (2nd Dept. 2004). Further, the expert’s affidavit failed to explain how he had reached the conclusions that he did. See, Delgado v. County of Suffolk, 40 A.D.3d 575, 576 (2nd Dept. 2007).

Moreover, even assuming that the close proximity of the living room to the top of the steps created a dangerous condition, such closeness did not impose any duty upon defendants to “protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (citations omitted), or where the allegedly dangerous condition can be recognized simply as a matter of common sense (citations omitted).” Rivas-Chirino v. Wildlife Conservation Socy., 64 A.D.3d 556, 557 (2nd Dept. 2009); see, Fotiatis v. Cambridge Hall Tenants Corp., 70 A.D.3d 631 (2nd Dept. 2010). Accordingly, neither plaintiff’s nor the expert’s affidavit was nor sufficient to raise a triable issue of fact.

Accordingly, defendant’s motion for summary judgment is granted, and the complaint hereby is dismissed. the plaintiff failed to raise a triable issue of fact

Dated: August 19, 2010

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J.S.C.