

Hamburg v 34 E. 67th St. Corp.

2010 NY Slip Op 32549(U)

September 14, 2010

Supreme Court, New York County

Docket Number: 112696/07

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT

J.S.C.

PART 10

Index Number : 112696/2007

HAMBURG, CHARLOTTE

vs

34 EAST 67TH STREET

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following 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

Upon the foregoing papers, It is ordered that this motion

FILED
SEP 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

**motion (a) and cross-motion(a)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 9/14/10


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
CHARLOTTE HAMBURG,

Plaintiff,

-against-

34 EAST 67TH STREET CORP., VENDO
SUENOS, LTD d/b/a THE GALLERY OF
WEARABLE ART, BRONNIE KUPRIS,
CROSSROADS and ARTHUR VOGELSANG,

Defendants.

Decision/Order

Index No.: 112696/07
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.

FILED
SEP 15 2010
NEW YORK
COUNTY CLERKS OFFICE

-----X
34 EAST 67TH STREET CORP.,

Third-Party Plaintiff,

-against-

VENDO SUENOS, LTD d/b/a THE GALLERY
OF WEARABLE ART and BRONNIE KUPRIS,

Third-Party Defendants.

Third-Party
Index No.: 591155/07

-----X
34 EAST 67TH STREET CORP.,

Second Third-Party Plaintiff,

-against-

Second Third-Party
Index No.: 112696/07

CROSSROADS and ARTHUR VOGELSANG,

Second Third-Party Defendants.
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
34 East's n/m [§ 3212] w/YHH affirm, exhs	1
Vendo & Kupris' x/m [3212] w/JRM affirm	2

Pltf's opp w/MD affirm (sep backs) 3, 4
 34 East's opp to x/m w/YHH affirm, exh 5
 Vendo & Kupris' reply w/DL affirm. 6
 34 East's reply w/YHH affirm 7

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

This is an action by plaintiff, Charlotte Hamburg ("Hamburg"), to recover monetary damages for the personal injuries she allegedly sustained when she tripped and fell on a rolled-up rubber floor mat.¹ 34 East 67th Street Corp. ("34 East") owns the building where the alleged incident occurred. Vendo Suenos, LTD. d/b/a the Gallery of Wearable Art ("Vendo") is a tenant in the building and Bronnie Kupris ("Kupris") is a personal guarantor for Vendo. Third-party defendants, Crossroads and Arthur Vogelsang² ("Vogelsang"), are alleged to have performed moving services for Vendo and Kupris on the date of the incident.

34 East has answered the complaint and now moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint against it, as well as all cross-claims and counterclaims. Vendo and Kupris cross-move for summary judgment, dismissing the complaint, cross-claims and counterclaims against them. Crossroads and Vogelsang, *pro se*, answered the complaint but have not otherwise moved.

Since issue has been joined and 34 East's motion was brought timely after plaintiff filed the note of issue, the motion will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order

¹Sometimes "rug."

² Identified in the verified third-party complaint as Arthur Vogelgesang.

[* 4]
is as follows:

Arguments

Plaintiff claims that she tripped and fell on a rolled-up rubber floor mat in the lobby of the building located at 34 East 67th Street, New York, New York (the "building"). The accident is alleged to have occurred on July 5, 2007 at approximately 3:00 p.m. Plaintiff claims defendants were negligent because the defendants had notice of, but failed to correct, the dangerous condition at the premises. 34 East, Vendo, and Kupris contend that plaintiff cannot establish her *prima facie* case and the complaint should be dismissed against them because the condition was open and obvious and not inherently dangerous and, even if there was a dangerous condition, there is no evidence establishing that defendants created or had notice of the dangerous condition alleged.

Plaintiff served a Verified Bill of Particulars dated October 31, 2007 and she has been deposed. Zvi Harry Kichel ("Kichel"), the building manager of 34 East, and Kupris were also deposed.

Plaintiff testified at her deposition that on the date of the accident, she was on her way to a hearing aid office located in the building. Plaintiff testified that she had never been to the building before that date. Plaintiff stated that she was 83 years old at the time of the incident and "a rolled up rug" caused her to fall. Plaintiff stated that, as she entered the lobby, there was a wall to the right and an open space to the left which led to the elevators. Plaintiff testified that the rolled-up rug was on the floor, parallel to the wall on the right, and both the wall and the rug were approximately six feet long.

Plaintiff stated: "I fell before I made my left." When asked when she first saw the rug, she replied, "as I came in." When asked, "did you see the rug before you fell?" she replied, "yes." Plaintiff further testified that the rug was eight feet from where she first entered the building. Plaintiff testified that she had "no idea" why she did not proceed to the left, to the open space, and instead, walked towards the wall when she first entered the building.

Kupris testified at her deposition that she hired Vogelsang, of Crossroads, to move four pieces of furniture and other miscellaneous items. Kupris stated that two movers arrived, and after she showed them what needed to be moved, she went to her office. Kupris stated that when she entered the building that morning, the mats were not rolled up. Kupris stated that she was not present when they were moving and she did not know the movers were going to roll-up the mats. Kupris first saw plaintiff after she had fallen on the floor. Kupris stated that when she went to help plaintiff, she observed the rug tightly rolled and that no section was sticking out. Kupris testified "it was only about six inches rolled in a very wide corridor. She had to have been walking very close to the wall."

Kichel testified at his deposition that, as building manager, he is responsible for all the basic operations of the building. Kichel stated that Kupris notified him that Vendo would be moving out of the building, but she did not give him a specific moving-out date. Kichel stated that he did not know Kupris was moving out until after plaintiff reported the accident to him. Kichel testified that when he arrived at the building that morning, the mats were not rolled up.

Discussion

Summary Judgment – Burden of Proof

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman, supra at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Defendants have the initial burden of making a *prima facie* showing that the condition was open and obvious and not inherently dangerous or that they 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. See Manning v. Americold Logistics, LLC, 33 A.D.3d 427 (1st Dept. 2006).

On this motion for summary judgment, defendants have the burden of proving their defenses. Thus, defendants must prove there was no dangerous condition, or if there was one, that they did not create it, nor did they have a sufficient opportunity, within the exercise of reasonable care, to remedy the situation. See Mercer v. City of New York, 223 A.D.2d 688, 689 (1996) *aff'd* 88 N.Y.2d 955 (1996); Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 (1986); Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 (1984) *aff'd* 64 N.Y.2d 670 (1984).

Open and Obvious / Dangerous Condition

It is black letter law that a landowner or possessor has a duty to maintain its property in a reasonably safe condition, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 A.D.2d 402 (1st Dept. 2001). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the possessor of land had actual or constructive notice of the hazardous condition which precipitated the injury. Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 (1st Dept. 2000).

Where a condition is open and obvious, the law further limits the duties imposed upon a property owner when a hazard on the property is apparent to all. Jones v. Presbyterian Hosp. in City of New York, 3 A.D.3d 225 (2004). In general, a landowner has no duty to warn of an open and obvious danger or to defects that would be noticed by "[a]ny observer reasonably using his or her senses." Tagle v. Jakob, 97 N.Y.2d, 165, 170 (2001). Where a danger is readily apparent, "there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent

as a warning would have provided [W]hen a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists[,] as no benefit would be gained by requiring a warning." Liriano v. Hobart Corp., 92 N.Y.2d 232, 242 (1998).

Where, however, the condition is open and obvious and not inherently dangerous, there is no duty to protect or warn against the open and obvious condition. Russ v. Fried, 73 A.D.3d 1153 (2d Dept. 2010). Although the issue of whether a hazard is open and obvious is generally fact-specific and thus a question for a jury (see, Liriano v. Hobart Corp., 92 N.Y.2d 232, 242 [1998]; Bolm v. Triumph Corp., 33 N.Y.2d 151, 159-160 [1973]); a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence (see, Tushaj v. City of New York, 258 A.D.2d 283, *lv denied* 93 N.Y.2d 818 [1999]; Paone v. County of Suffolk, 251 A.D.2d 563, 564; Russell v. Archer Bldg. Ctrs., 219 A.D.2d 772).

Courts have granted summary judgment where the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous. See e.g. Burke v. Canyon Road Restaurant, 60 A.D.3d 558, (1st Dept. 2009) (front step was clear of debris and water and area of the accident was illuminated); Broodie v. Gibco Enterprises, Ltd., 67 A.D.3d 418 (1st Dept. 2009) (step separating bar area from dining area in restaurant); Gibbons v. Lido & Point Lookout Fire Dist., 293 A.D.2d 646 (2d Dept. 2002) (cement parking block on floor of a firehouse about 2 feet from the wall); Connor v. Taylor Rental Ctr., 278 AD2d 270 (2d Dept. 2000) (forklift in a marked stall in a parking lot); Maravalli v Home Depot U.S.A., 266 A.D.2d 437 (2d Dept. 1999) (sink vanity on the floor of the store aisle); Weiner v. Saks Fifth

Ave., 266 A.D.2d 390 (2d Dept. 1999) (legs of a clothing rack in a narrow pathway created by the racks). In the above cited circumstances, as in the present case, the conditions leading to the accident were open and obvious and could not fairly be attributed to negligent maintenance of the property.

Although whether an "asserted hazard is open and obvious cannot be divorced from the surrounding circumstances" a condition that is "ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured by crowds or the plaintiffs attention is otherwise distracted" (see, e.g. Sanchez v Toys "R" Us, 303 A.D.2d 165 [2003] [fall over low 3-foot-by-4-foot rack two days before Christmas]; Thornhill v Toys "R" Us NYTEX, 183 A.D.2d 107 1 (1992) [raised platform obscured by clothing rack and cart]; De Conno v Golub Cop., 255 AD2d 734 (1998) [orange marker cone appearing suddenly to patron rounding corner]). Mauriello v. Port Auth. Of N.Y. and N.J., 8 AD3d 200, 779, N YS2d 199 (1st Dept. 2004); Ellis v. City of New York, 2008 NY Slip Op 30390 (U) (Sup. Ct., N.Y. Co. 2008).

The court finds that the rolled-up rug/mat was not an inherently dangerous condition and was readily observable by the reasonable use of one's senses. Kupris testified that the rug was tightly rolled against the wall and no section was sticking out. Plaintiff's own testimony does not support a conclusion that the rug, as positioned, obstructed her pathway or was otherwise dangerous. She testified that she saw the rolled-up rug as she entered the building and had "no idea" why she did not proceed to the open space on the left towards the elevators, and instead, walked towards the wall when she first entered the building. Furthermore, there was no evidence suggesting that the lobby was inadequately lit (Broodie, supra), that the rug obstructed plaintiff's

path, or that plaintiff was trapped, otherwise distracted, or that the condition was obstructed by crowds (Mauriello, supra).

Plaintiff argues that, even if the condition was open and obvious that, at most, this would only relieve defendants of a duty to warn. See Garrido v. City of New York, 9 A.D.3d 267 (1st Dept. 2004). While the court agrees with this proposition of law, plaintiff does not address the argument of whether the rolled-up mats were inherently dangerous. Courts have routinely dismissed cases where both predicates are met, i.e.- [1] the condition was open and obvious; and [2] it was not inherently dangerous. Burke, supra; Broodie, supra; Gibbons, supra; Connor, supra; Maravalli, supra; Weiner, supra.

Defendants, relying on plaintiff's own testimony, demonstrate that there was no danger. Plaintiff does not submit her own affidavit in opposition, nor does she direct the court to further EBT testimony or other evidence that the rolled-up mats were inherently dangerous.

Similarly, if a non-owner, such as Vendo, Kupris, Crossroads, or Vogelsang created the condition, they would owe no duty to plaintiff, since the condition was not inherently dangerous. Pipitone v. 7-Eleven, Inc., 67 A.D.3d 879 (2d Dept. 2009).

Accordingly, 34 East's motion for summary judgment and Vendo and Kupris' cross-motion for summary judgment are granted to the extent that the complaint is dismissed.

Indemnification

34 East alleges that Vendo breached its contractual obligation to defend,

indemnify, and maintain liability insurance, as provided under the lease agreement (the "Lease") between 34 East and Kupris on behalf of Vendo. The Lease, dated September 1, 1994 was for a 2 year and 7 month term. The parties extended the Lease by a series of modifications and extensions until May 31, 2000. Thereafter, Kupris maintained a month to month tenancy. On April 27, 2007, Kupris paid rent for the months of May and June of 2007 and vacated the premises on June 15, 2007. Kupris testified in her EBT that the owner allowed her to keep a few large pieces of furniture on the premises until July 15, 2007. Kupris removed the remaining furniture on July 5, 2007, the date of the accident. In support of its motion, 34 East provides an invoice, dated July 7, 2007, seeking payment from Kupris for July 1 through July 14, 2007.

It is undisputed that Kupris paid rent for May and June and surrendered the premises on June 15, 2007. Therefore, any obligation under the Lease to insure/defend/indemnify did not continue beyond June 30, 2007. Kupris did not pay for the month of July, nor is there any indication that 34 East demanded payment. Furthermore, there is no proof that 34 East mailed the invoice, billed Kupris for July, or that the parties mutually agreed to extend the Lease beyond June 30, 2007.

Accordingly, any rights that 34 East may have had under the Lease were extinguished at the time of the accident, as the Lease was no longer in effect on July 5, 2007. The court, therefore, finds that Vendo had no contractual obligation to defend, indemnify, or insure 34 East on the date of the accident. The third-party and second third-party actions are hereby severed and dismissed and the portion of 34 East's motion that seeks indemnification is denied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant, 34 East 67th Street Corp.'s motion for summary judgment is **GRANTED** dismissing the complaint, and is **DENIED** as to all cross-claims against Vendo; and it is further

ORDERED that defendant, Vendo Suenos, LTD d/b/a The Gallery of Wearable Art and Bronnie Kupris' cross-motion for summary judgment is **GRANTED** dismissing the complaint and all cross-claims and counter-claims against it; and it is further

ORDERED that the third-party and second third-party actions are hereby severed and dismissed; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
September 14, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
SEP 15 2010
NEW YORK
COUNTY CLERK'S OFFICE