

Perez v Grenadier Realty Corp.

2011 NY Slip Op 30383(U)

February 10, 2011

Supreme Court, Richmond County

Docket Number: 103284/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 103284/08
Motion No.:002**

NANCY PEREZ,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**GRENADIER REALTY CORP.,
NORTH SHORE ASSOCIATES, and
HOWLAND HOOK HOUSING CO., INC.,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants move for summary judgment dismissing the plaintiff's complaint. The defendants' motion is denied.

The plaintiff alleges that she sustained personal injuries as a result of a trip and fall over a pothole located on the parking lot of the premises, 85 Holland Avenue, Staten Island, New York. During the plaintiff's examination before trial she testified that the pothole was approximately five inches deep and existed for approximately one month before the plaintiff's accident. Defendants' produced John Lombardi an employee of the defendant, Grenadier Realty Corporation. Lombardi is the superintendent of the Holland Avenue Houses for approximately 22 years. He testified that he did not have a recollection as to whether there were any potholes in

the parking lot where the plaintiff fell. Lombardi testified that he was not responsible for maintaining the parking lot. And that an outside contractor identified as R. Juniors handled the maintenance and repair of the parking lot at 85 Holland Avenue, Staten Island, New York.

Furthermore, three black and white photographs submitted as exhibits to the defendants' motion depict a large depression in the parking lot where plaintiff allegedly had her accident. In addition, the plaintiff annexed the affidavit of her daughter, Kiesha Perez, who witnessed the incident. In that affidavit Kiesha Perez avers that she saw the pothole that caused her mother to fall.

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party

¹ *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

opposing the motion.⁵

“A defendant has ‘a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries’ . . . However, it is well settled that there is no duty on the part of the landowner to warn against a condition, as here, that can readily be observed by those employing the reasonable use of their senses.”⁶ The defendants argue that the pothole which the plaintiff alleges that she fell was so open and obvious that they did not have a duty to warn the plaintiff of the condition. The plaintiff testified that the pothole she fell in was approximately 5 inches deep, but the record was devoid as to the length and width of the pothole in question. While it has been asserted that the pothole was one foot long, there has not been a corresponding citation to the record to support such a finding.

Furthermore, the two cases cited by the defendant, *Robinson v. Lupo*⁷ and *Pianforini v. Keltie’s Bum Steer*⁸ are inapplicable to these facts. In each of those cases the plaintiffs could not state what caused them to fall. And in the case of *Pianforini* the case the defendants appealed a jury verdict of \$314,077.22 and the denial of a motion for summary judgment at the close evidence in the trial. Here, the plaintiff has always asserted that her fall was caused by a pothole.

“As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property. . . The plaintiff must demonstrate that the defendant created the condition which caused the fall, or that the defendant had actual or constructive notice of the condition. . . Furthermore, to oppose a motion for summary judgment, a party must submit sufficient evidence in admissible form to demonstrate

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁶ *Paulo v. Great Atl. & Pac. Tea Co.*, 233 AD2d 380, [2d Dept 1996].

⁷ 261 AD2d 525, [2d Dept 1999].

⁸ 258 AD2d 634, [2d Dept 1999].

the existence of triable issues of fact.”⁹

The witness produced by the defendants clearly stated that he was not responsible for maintaining the parking lot in question. The witness testified as follows:

Q. Were you familiar with any potholes in the parking lot of 85 Holland Avenue on or before August 26, 2005?

MR. LINDY: Objection to the form. You can answer, if you know.

A. I don't recall.

Q. You don't recall?

A. No.

Q. As part of your duties in August of 2005, did you have any responsibility for maintenance or repair of the parking lot at 85 Holland Avenue?

A. No, there's an outside contractor that comes in and repairs.

The defendants have failed to come forward with evidence in admissible form that would demonstrate that they are entitled to summary judgment. The court will therefore not consider the sufficiency of the plaintiff's opposition.

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the parties shall return to DCM Part 3 (130 Stuyvesant Place, 3rd Floor) on **Monday, February 28, 2011 at 9:30 a.m.**

ENTER,

⁹ *Allen v. Pearson Publishing*, 256 AD2d 528, [2d Dept 1998].

DATED: February 10, 2011

Joseph J. Maltese
Justice of the Supreme Court