Pasie v 137 Lawrence Ave. Realty Corp.

2011 NY Slip Op 30570(U)

March 1, 2011

Supreme Court, Nassau County

Docket Number: 13856/09

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 8

GRACE PASIE,

Plaintiff,

-against-

137 LAWRENCE AVENUE REALTY CORP. and LAWRENCE FUNERAL CHAPEL,

Defendants.

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XXX

MOTION DATE: 1/12/11

SEQUENCE NO. 001

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Upon the foregoing papers, the motion by defendants for summary judgment on liability grounds, pursuant to CPLR §3212, is granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The within action arises from a claim for damages brought by plaintiff for personal injuries allegedly sustained on January 25, 2009 as a result of a fall at or near the front entrance of the premises known as 137 Lawrence Avenue, Lawrence, New York.

Movants contend that they are entitled to summary judgment on the grounds that there can be no finding of liability against them as the step from which the plaintiff fell was not defective and was not the proximate cause of plaintiff's fall and/or her injuries. Additionally, defendant 137 Lawrence Avenue Realty Corp. was an out-of-possession landlord with no duty to maintain the premises and no notice of any purported defect.

The accident is alleged to have occurred on January 25, 2009 when plaintiff was leaving the Lawrence Funeral Chapel (hereinafter "Chapel") after attending a wake service. Plaintiff left

the Chapel from the same location that she had entered earlier. After exiting the front door, plaintiff stepped down onto a level brick walkway. There were many people around her, and after walking a number of feet forward along the walkway, she failed to notice that there was a step leading onto a brick driveway. As a result, plaintiff fell. Movants submit plaintiff's deposition testimony in which plaintiff testified that she did not see the step because there were so many people around her. She further testified that the walkway was brick and the place that she stepped down to was brick, so she did not notice that there was a step there. Plaintiff had been looking straight at the time of the accident and testified that she did not see the step at any time before she fell off of the step, despite it being "light enough" outside at the time she exited the Chapel. It is undisputed that there was no snow or ice on the step at the time of plaintiff's fall. Plaintiff also testified that she was unaware of any complaints about the step or walkway at issue prior to her accident and that she, herself, did not make any complaints upon entering the Chapel for the wake service.

In further support of their motion, defendants submit the deposition transcript of Leonard Pennisi, who was deposed on behalf of SCI Funeral Services of New York, d/b/a Lawrence Funeral Chapel. Mr. Pennisi testified that the Chapel is a tenant pursuant to a twenty year lease that started in 1999. The landlord is 137 Lawrence Avenue Realty Corp. Mr. Pennisi has worked at the Chapel for ten years, during which time the brickwork in the front of the building has always been in existence. Mr. Pennisi testified that he never received any complaints about the design features of the driveway to the Chapel, nor has anyone ever previously fallen on the Chapel entranceway prior to January 25, 2009. The Chapel's tenancy began in 1999, and from that time forward, there were no alterations to the front of the building or to the driveway design. Mr. Pennisi also submitted an affidavit in which he attested that there were never any complaints or injuries concerning the front step, entrance or front walkway and driveway apron in the ten years prior to plaintiff's accident. He also attested that he was present when defendant's expert inspected the premises on June 30, 2010, and that the front walkway and driveway existed in the same condition on June 30, 2010 as it did on the date of plaintiff's accident.

Defendant's expert, Anthony Mellusi, an engineer and safety expert submits an affidavit in which he attests that there was no defect on the entrance step of the premises and that the step

conformed to all applicable regulations, including the latest version of the New York State Building & Fire Prevention Code applicable to the building. Mr. Mellusi attests that the building has one exterior step at the front entrance that is 5 feet two and one-half inches long and leads to a brick driveway apron area. The center is six inches above the driveway apron surface and is made of brick without any depressions or surface or structural defects. Mr. Mellusi attests that the New York State Building and Fire Prevention Code applicable at the time of plaintiff's accident did not require handrails for a single exterior step of six inches in height as it exists at the Chapel. It also did not require any type of nosing at the lip or edge of the step or any demarcation of or difference in the design, color or texture of such step with the surface below it. He concludes that the front entrance, step, walkway, and driveway apron at the Lawrence Funeral Chapel conformed to the Building Code in effect at the time of the alleged accident and did not contain any safety defects.

Movants also submit an affidavit of Eva San Fillippo, president of defendant 137 Lawrence Avenue Realty (hereinafter "Realty"), who attests that Realty has owned the premises since 1993 and leases the building to defendant Chapel. She attests that there have been no additions, renovations or structural changes to the building since it was acquired in July 1993. She further attests that there have been no complaints made to defendant Realty regarding the condition of the front entrance, steps, walkway, or driveway apron prior to plaintiff's accident and that there have been no injuries reported to it by anyone using the front entrance, step, walkway, or driveway apron.

Lastly, Movant submits the affidavit of original owner, Charles Morelli, Jr. Mr. Morelli attests that he owned the premises until conveyed to defendant Realty. He further attests that in the late 1970's, the building was renovated from a restaurant establishment to accommodate the operation of a funeral home, but thereafter, there were no additions, renovations or structural changes to the building at 137 Lawrence Avenue from the remainder of the time that he had an ownership interest therein (until July 1993).

The movants have established a prima facie showing of entitlement to summary judgment on the grounds that there can be no finding of liability as against the defendants herein. The 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." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). The movants herein have demonstrated through admissible evidence that no dangerous or defective condition existed on the defendants' premises, that the defendants did not have actual or constructive notice of the alleged condition and that they did not cause or create it, and that the alleged dangerous or defective condition was not the proximate cause of plaintiff's fall. (*See, Pena v. Women's Outreach Network, Inc.*, 35 A.D.3d 104, 824 N.Y.S.2d 3 (1st Dept. 2006)).

Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 N.Y.2d 557 (Ct. of App. 1980)).

In her opposition, plaintiff has failed to create a question of fact sufficient to defeat defendants' prima facie showing of entitlement to summary judgment. In opposition, plaintiff submits an affidavit in which she attests that she "missed the step" because the design made it difficult for her to walk. She also attests that she had to exit from the front, which did not have any handrails. Lastly, she attests that the entrance ramp, which she did not learn of until after the accident, as well as a path to her left, were both blocked by flower pots and snow, forcing her to take the route that she took to leave the premises.

Plaintiff further submits an affidavit of professional engineer, Jacques P. Wolfner, who attests that he surveyed the site at issue on April 12, 2009. Mr. Wolfner's affidavit, however, does not state that the defendants violated any part of the existing Building Code, enacted in 2003 and applicable to renovations, etc. of existing buildings. The building was not altered since the late 1970's, as evidenced by the affidavits submitted by defendants, and the Building Code was not enacted until 1984 and does not apply to unaltered existing buildings. In addition, Mr. Wolfner fails to state whether the cited Code sections existed when the building was renovated in the 1970's or were in effect at the time of plaintiff's accident. As such, Mr. Wolfner's affidavit fails to establish that any code violation existed. (*See, Ryan v. KRT Property Yholdings, LLC*, 45 A.D.3d 663, 845 N.Y.S.2d 431 (2d Dept. 2007); *Meehan v. David J. Hodder and Son, Inc.*, 13 A.D.3d 593, 788 N.Y.S.2d 134 (2d Dept. 2004)).

Further, Mr. Wolfner's affidavit also fails to establish the source of the history of the accident upon which he relies, as he does not note that he reviewed any deposition testimony, affidavits of plaintiff or defendants, the pleadings in this action, or the bill of particulars. Accordingly, his affidavit lacks foundation.

Finally, Mr. Wolfner's reference to the ASTM Standards are misplaced as there are no allegations of any violations of same pled within the bill of particulars. A plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to the motion. *(Araujo v. Brooklyn Martial Arts Academy*, 304 A.D.2d 779, 758 N.Y.S.2d 401 (2d Dept. 2003)). Further, Mr. Wolfner does not state that ASTM is or was a required standard for construction in the late 1970's when the Chapel was last renovated, nor does he claim that the ASTM Standard applies to the Chapel.

Lastly, plaintiff has not opposed defendant Realty's prima facie showing of entitlement to summary judgment upon the grounds that it is an out of possession landlord with no duty to maintain the premises and no notice of any purported defect.

Accordingly, plaintiff has failed to raise a question of fact sufficient to defeat defendants' prima facie showing of entitlement to summary judgment. Defendants motion for summary judgment is granted and plaintiffs' action is dismissed.

Dated: March 1, 2011

Anthony L. Parga, J.S.C.

ENTERED
MAR 03 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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