

Brown v Bank of New York Mellon Corp.

2011 NY Slip Op 31709(U)

April 21, 2011

Supreme Court, New York County

Docket Number: 109552/2009

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

YANIQUE BROWN,

Plaintiff,

- against -

THE BANK OF NEW YORK MELON
CORPORATION, INDIVIDUALLY AND AS
SUCCESSOR TRUSTEE UNDER NOVASTAR
MORTGAGE FUNDING TRUST SERIES
2003-2006,

Defendant.

INDEX NO. 109552/2009

MOTION DATE _____

MOTION SEQ. NO. 001

~~MOTION CALL NO.~~
FILED

JUN 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

The following papers were read on this motion by defendant for summary judgment pursuant to CPLR 3212 .

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Defendant moves for summary judgment pursuant to CPLR 3212, dismissing plaintiff's complaint. This case involves a claim that, on May 17, 2009, plaintiff tripped and fell down the stairs of her former residence in a building now owned by defendant as of May 1, 2009 (bill of particulars, item 7). Defendant acquired ownership of the premises, a three-story private home, through a foreclosure sale on May 1, 2009. Plaintiff, a 22 year old female, who lived in the premises since August 2008, and whose residence at the premises was due to terminate on June 30, 2009, alleges that on May 17, 2009, she was injured due the defendants' negligence in causing, creating or maintaining a defective, hazardous or dangerous condition on the stairs (complaint, ¶¶ 17-20). Defendant answers the complaint and alleges, *inter alia*, contributory negligence as a defense (answer, affirmative defenses ¶¶ 3 and 9). Note of Issues has been filed.

Parties' Allegations

Plaintiff contends that, on May 17, 2009, she was residing in a second-floor apartment in a house owned by defendant (complaint, ¶ 6) located at 142-09 231st Street, Queens, New York (plaintiff EBT, at 11). Plaintiff states that there were stairs to the second-floor attic bedroom where she lived (plaintiff EBT, at 16). She further contends that the stairs were carpeted, but that the carpeting was loose and worn and that the handrails on the stairs had a (design) gap (*id.* at 18-19, photographs exhibit d).

Plaintiff asserts that, as she was descending the stairs, when she was approximately halfway down, she stepped forward and there wasn't "enough support" to hold her foot and she fell down the stairs (*id.* at 18-19). She states that there wasn't enough time for her to reach out to grab the handrail (*id.* at 18). Plaintiff further states that, as a result of the fall, she was taken to Long Island Jewish Hospital, where her left leg was x-rayed, and it was determined that she suffered a left ankle fracture (*id.* at 20-21). She also states that she ultimately required surgery and internal fixation for her injury (*id.* at 26-29, 37).

Plaintiff alleges that the loose and worn carpeting was in the same condition from the time when she moved into the Premises in August 2008 until her accident on May 17, 2009 (plaintiff affidavit, ¶¶ 3, 5).

Plaintiff further contends that defendant had actual and constructive notice of the purportedly defective condition of the staircase, as well as a defective handrail (bill of particulars, item 9) and that she has a valid claim of premises liability negligence.

Defendant contends that it acquired the Premises pursuant to a referee's deed on May 1, 2009, after foreclosure and sale of the Premises (Exhibit A), that a listing agent went to the Premises on May 14, 2009, so that it could be cleaned, listed and eventually sold (Santiago EBT, at 14, 24-25). The agent spoke with plaintiff, who agreed to move out by June 30, 2009 and plaintiff did not make any complaint as to the condition of the Premises (*id.* at 27-28, 54).

Defendant further asserts that, according to an FHA Renovation Assessment dated July 29, 2009 (the Assessment), there was "(n)o area of concern" on the staircase at that time (Exhibit K). Consequently, defendant claims that there was no notice of any defective condition at the Premises and that plaintiff's complaint should be dismissed.

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Additionally, an attorney's affirmation can serve as the vehicle for the submission of appropriate attachments, such as deposition transcripts or documents, which provide evidentiary proof in admissible form, but unsworn documents are insufficient (*Zuckerman*, 49

NY2d at 563; *Tortorello v Carlin*, 260 AD2d 201, 204 [1st Dept 1999]).

Premises Liability

A landowner has the duty to maintain its property in a reasonably safe manner under the circumstances, which include the likelihood of harm to others, the potential seriousness of the risk and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233, 241 [1976]; *O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106, 106 [1st Dept 1996]).

To sustain a claim, a plaintiff must show that the landowner has either created or had actual or constructive notice of the purportedly hazardous condition that caused the accident (*id.* at 106; *Piacquadio v Recline Realty Corp.*, 84 NY2d 967, 969 [1994]). Constructive notice requires that the "defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit (defendant) to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Discussion

Applying these principles to this case, defendant's motion for summary judgment is granted in part to dismiss some of the plaintiff's claims, but denied in part, thereby sustaining a portion of plaintiff's claims.

Plaintiff's claim concerning the handrail must be dismissed, since according to her testimony, she did not have enough time to reach out and attempt to grab it when she fell (plaintiff EBT, at 18). Accordingly, it was not a proximate cause of the accident. Defendant has denied that it created or that it had actual notice of allegedly defective condition of the carpeting on the stairs and plaintiff has failed to present any evidence controverting this showing. Facts which are not controverted are deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]). Therefore, the portion of plaintiff's claim involving the creation of the allegedly defective carpeting/handrail or actual notice of this condition is dismissed.

However, the Assessment is dated after the accident and is an unsworn document without any evidentiary value (*Zuckerman*, 49 NY2d at 563) and thus, it cannot support defendant's claim as to the purported adequacy of the carpeting at the Premises at the time of the accident (*Moore v 793-797 Garden St. Hous. Dev. Corp.*, 46 AD3d 382 [1st Dept 2007]).

Moreover, plaintiff alleges that the carpeting had been loose and worn from August 2008 when she moved into the Premises until her accident on May 17, 2009 (plaintiff affidavit, ¶¶ 3, 5). Defendant had ownership of the Premises from the date of the purchase by referees' deed on May 1, 2009 and has not established that the 17 days until plaintiff's accident was insufficient to discover and repair the allegedly defective carpeting. Plaintiff has, therefore, established a triable issue of fact as to the condition of the carpeting on the stairs and defendant's *constructive* notice of this condition.

It is, therefore,

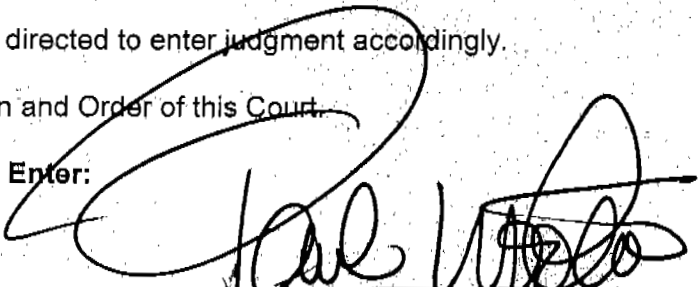
ORDERED that defendant's motion for summary judgment dismissing plaintiff's complaint is granted to the extent of dismissing plaintiff's claims, except as to the question of constructive notice of the condition of the carpeting on the stairs at the Premises located at 142-09 231st Street, Queens, New York; it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of this Court.

Dated: 4-21-11

Enter:


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE

FILED

JUN 27 2011