

Phillips v County of Nassau

2011 NY Slip Op 32689(U)

October 11, 2011

Sup Ct, NY County

Docket Number: 13148/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MICHAEL PHILLIPS,

Plaintiff,

- against -

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 13148/10
Motion Seq. No.: 01
Motion Date: 09/02/11

THE COUNTY OF NASSAU and METROPOLITAN
SUBURBAN BUS AUTHORITY d/b/a MTA LONG
ISLAND BUS,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant County of Nassau ("Nassau") moves, pursuant to CPLR § 3212, for an order granting it summary judgment. Plaintiff opposes the motion. The action against defendant Metropolitan Suburban Bus Authority d/b/a MTA Long Island Bus has been discontinued.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on December 17, 2009.

In the Verified Complaint, plaintiff alleges that, at approximately 11:15 a.m. on December 17, 2009, he was injured as the result of a fall which occurred at or near a bus shelter located on the east side of Central Avenue near Seaton Gate in North Valley Stream when he

attempted to support himself by placing his right hand and arm against the rear portion of said bus shelter without realizing that the plexiglass panel was missing. This caused plaintiff to fall through the frame of the bus shelter and strike his head and face on the ground. Plaintiff fractured his neck in two places - two cervical vertebra C1 and C2- as well as sustained a spinal cord compression. Plaintiff argues that defendant Nassau was careless and negligent in the ownership, operation, management, maintenance and control of the public bus shelter, in failing to warn of a missing plexiglass panel and in failing to replace the missing panel.

On or about March 11, 2010, plaintiff served defendant Nassau with a Notice of Claim with respect to the alleged incident. Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about July 12, 2010. Issue was joined by defendant Nassau on or about July 22, 2010.

Defendant Nassau moves for summary judgment dismissing the Verified Complaint on the grounds that it did not receive prior notice of the alleged defective condition and that plaintiff's allegations that defendant Nassau failed to warn him of a dangerous condition are without merit as said condition was readily observable. In support thereof, defendant Nassau relies upon the Examination Before Trial ("EBT") deposition testimony of Rona Moyer, a planner in the transportation division of the Planning Department of the County of Nassau. *See* Defendant Nassau's Affirmation in Support Exhibit D. Ms. Moyer testified that part of her duties include issues concerning bus shelters in Nassau County. Ms. Moyer acknowledged that the bus shelter at issue was owned by defendant Nassau and that maintenance responsibility for said shelter was pursuant to a contract entered into in January 1997 between defendant Nassau and a company originally named Network International/Culver Associates Limited ("Culver"), which subsequently changed its name to Signal Outdoor Advertising. If a bus shelter was physically damaged in some way as of December 17, 2009, it was Culver's responsibility to repair it on

behalf of defendant Nassau. Ms. Moyer further testified that, in December 2009, defendant Nassau had no knowledge that the bus shelter at issue was damaged. If any complaints had been made to defendant Nassau, they would have been forwarded to Ms. Moyer and then she had the responsibility to relay (by e-mail) the need for repairs to Culver. Ms. Moyer would keep a copy of said e-mails in her computer. Ms. Moyer checked her computer for any complaints with respect to the subject bus shelter prior to the date of the alleged incident and found no such e-mails. Defendant Nassau argues, “[i]n the instant matter, the witness for the County testified that she was responsible for receiving and forwarding to the contractor any complaints received by the County concerning conditions of the County bus shelter, and that a search of her records failed to reveal the receipt of any such complaints. The Plaintiff has offered no proof as to the length of time that the alleged condition existed prior to the Plaintiff’s alleged incident.”

Defendant Nassau also argues that plaintiff has offered no evidence that the alleged condition was caused or created by any act of defendant Nassau. Furthermore, there is no obligation to warn against a condition that can be readily observed by the reasonable use of one’s senses. Readily observable conditions do not pose an unreasonable risk. Defendant Nassau contends that the condition of the subject bus shelter was in fact readily observable as there was nothing present that blocked or obscured plaintiff’s view as he looked towards said bus shelter and the alleged incident occurred at 11:15 a.m., during the daylight hours.

In opposition, plaintiff does not deny that defendant Nassau did not have prior actual notice of the alleged defect, nor does he suggest that defendant Nassau created the condition. Instead, plaintiff argues that defendant Nassau “has completely failed in its burden for the purpose of this motion to show lack of constructive notice. To do so defendant would require proof that the plexi glass (*sic*) in question was missing for so short a period of time that acting reasonably it could not have discovered the defect and remedied it.” Plaintiff argues that

defendant Nassau never inspected the premises prior to the subject incident and cannot present any evidence that the subject condition did not exist for a sufficient period of time.

In reply to plaintiff's opposition, defendant Nassau argues that "[p]laintiff's argument that to satisfy the burden of showing lack of constructive notice would require the County to show proof that the plexi-glass in question was missing for a short period of time is unsupported by any case law in support of said position. Obviously, if the County states that it had no prior notice of the alleged condition, it would be impossible to offer proof showing that the glass was missing for only a short period of time....it is respectfully submitted that the plaintiff has failed to rebut the defendant's prima facie showing of entitlement to summary judgment as a matter of law by failing to show evidence to establish that the County had prior notice of the alleged condition or that the condition was not so open and obvious to anyone approaching the shelter that it should have been seen by the reasonable use of their senses."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a

material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

In seeking summary judgment dismissing the complaint, the defendant has the initial burden of establishing that it did not create the alleged dangerous condition and did not have actual or constructive notice of it. *See Pelow v. Tri-Main Development*, 303 A.D.2d 940, 757 N.Y.S.2d 653 (4th Dept. 2003).

“To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it.” *See Leary v. Leisure Glen Home Owners Ass’n, Inc.*, 82 A.D.3d 1169, 920 N.Y.S.2d 193 (2d Dept. 2011); *Williams v. SNS Realty of Long Island, Inc.*, 70 A.D.3d 1034, 895 N.Y.S.2d 528 (2d Dept. 2010); *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512 (2d Dept. 2009). *See also Denker v. Century 21 Dept. Stores, LLC*, 55 A.D.3d 527, 866 N.Y.S.2d 681 (2d Dept. 2008); *Rubin v. Cryder House*, 39 A.D.3d 840, 834 N.Y.S.2d 316 (2d Dept. 2007).

Of course, a defendant must have either actual or constructive notice of the hazardous condition that caused the plaintiff to slip and/or fall. *See Piacquadio v. Recine Realty Corp.*, 84

N.Y.2d 967, 662 N.Y.S.2d 493 (1994); *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986).

“A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected.” *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, *supra*; *Gordon v. American Museum of Natural History*, *supra*; *Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638, 908 N.Y.S.2d 713 (2d Dept. 2010); *Cusack v. Peter Luger, Inc.*, 77 A.D.3d 785, 909 N.Y.S.2d 532 (2d Dept. 2010).

A negligent failure to discover a condition that should have been discovered can be no less of a breach of due care than a failure to respond to the actual notice of such a condition. *See Blake v. City of Albany*, 48 N.Y.2d 875, 424 N.Y.S.2d 358 (1979).

Where the plaintiff proceeds on the theory of constructive notice, the plaintiff must ultimately prove *at trial* that the defect which caused the accident was visible and apparent, and that it existed for a sufficient length of time prior to the accident to permit the defendant (or its employees) to discover and remedy it (emphasis added). *See Gordon v. American Museum of Natural History*, *supra*; *Daniely v. County of Westchester*, 297 A.D.2d 654, 747 N.Y.S.2d 239 (2d Dept. 2002), *lv to app den.* 100 N.Y.2d 501, 760 N.Y.S.2d 764 (2003).

It is the existence of an issue, not its relative strength that is the critical and controlling consideration in the determination of a summary judgment motion. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964). Summary judgment is seldom appropriate in negligence cases. *See Vandewater v. Sears*, 277 A.D.2d 1056, 716 N.Y.S.2d 495 (4th Dept. 2000); *Connell v. Buitekant*, 17 A.D.2d 944, 234 N.Y.S.2d 336 (1st Dept. 1962).

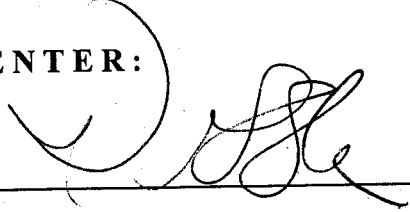
Based upon the arguments presented in the papers before it, and construing the evidence in a light most favorable to plaintiff, the Court finds that there exists an issue of material fact

concerning whether defendant Nassau had constructive notice of the condition alleged to have caused plaintiff's fall.

Consequently, defendant Nassau's motion, pursuant to CPLR § 3212, for an order granting it summary judgment is hereby **DENIED**.

All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, DCM Trial Part on November 1, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 11, 2011

ENTERED
OCT 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE