

Clark v Jay Realty Corp.
2011 NY Slip Op 33072(U)
November 23, 2011
Supreme Court, New York County
Docket Number: 104820/09
Judge: Marcy S. Friedman
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SCANNED ON 11/28/2011

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

MARCY S. FRIEDMAN

PRESENT: _____
Justice

PART 57

Index Number : 104820/2009

CLARK, GLORIA

vs.

MUR-JAY REALTY CORP.

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. 104820 09

MOTION DATE _____

MOTION SEQ. NO. 066

Is motion ~~to~~ for summary judgment
its _____
_____ | No(s) 1-9, M1
_____ | No(s) _____
_____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

FILED

NOV 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: Nov 23, 11


_____, J.S.C.
MARCY S. FRIEDMAN

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED

NOV 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
GLORIA CLARK

Plaintiff,

Index No.: 104820/2009

- against -

JAY REALTY CORP., GUIDING EYES FOR THE
BLIND, INC., and JAMES GARDNER

Defendants.

DECISION/ORDER

_____ x

In this personal injury action, plaintiff seeks damages for injuries sustained on November 13, 2008, while walking on a sidewalk. Defendant Jay Realty Corp. (Jay Realty) moves for summary judgment dismissing plaintiff's complaint and all cross-claims. Defendants Guiding Eyes for the Blind, Inc. and James Gardner (Guiding Eyes and Gardner, respectively) cross-move for summary judgment dismissing plaintiff's complaint and all cross-claims. Plaintiff cross-moves under CPLR §3403(a)(4) for a trial preference based on age.

It is not disputed that at the time of the accident, plaintiff was being evaluated for suitability for a seeing eye dog by Gardner, an employee of Guiding Eyes. The evaluation consisted of a walk on a public sidewalk in which plaintiff, while holding a harness handle, followed Gardner, who simulated the actions of a guide dog. Plaintiff fell during this walk and sustained a fractured hip. (P.'s Bill of Particulars, ¶ 16, [D.'s Ex. F].) According to plaintiff, the accident occurred in front of 1275 Third Avenue, New York, New York, a property owned by defendant Jay Realty.

The cause of the accident is disputed. Plaintiff claims that she tripped on a raised

sidewalk flag leading to Jay Realty's premises. She further claims that Jay Realty was negligent in permitting the defective flag to exist and that Guiding Eyes, through Gardner, was negligent in failing to steer plaintiff clear of the hazard. (Id., ¶¶ 6, 15.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Jay Realty moves for summary judgment primarily on the ground that plaintiff is unable to identify the cause of her fall. Plaintiff testified that "my toes hit something and I kind of flew in the air and landed on my right side." (P.'s July 16, 2010 Dep. [Dep. 1] at 115.) Plaintiff also described the cause of the accident as coming into contact with "a raised area," a "curb-like raise," and a "raised piece." (P.'s Aug. 30, 2010 Dep. [Dep. 2] at 12, 20, and 47.) However, Jay Realty claims that the cause of the accident is speculative, as plaintiff is blind and did not see the alleged condition on the sidewalk. It also cites plaintiff's testimony that she did not know what her toes hit. (P.'s Dep. 1 at 123.) Jay Realty further cites Gardner's testimony that he did not actually see her feet make contact with the raised area. (Gardner Dep. at 89-90.)

Defendant's claim that the cause of plaintiff's accident was speculative ignores plaintiff's repeated testimony that her toes made contact with a raised area. It also ignores that although

Gardner testified that he was walking in front of and did not see plaintiff at the moment of the accident, he also testified that she landed “right in the middle of the stoop,” his terminology for the raised flag. (Id. at 92.)

In opposition to a motion for summary judgment, plaintiff need not discharge her ultimate burden of proof in the case, but she must show a triable issue of fact. (See Massey v New York City Hous. Auth., 230 AD2d 601 [1st Dept 1996].) While plaintiff need not “rule out all plausible variables and factors that could have caused or contributed to the accident” (Gayle v City of New York, 92 NY2d 936, 937 [1998]), she must show that “it was ‘more likely’ or ‘more reasonable’ that the alleged injury was caused by the defendant’s negligence than by some other agency.” (Id. [internal citations omitted]; Holliday v Hudson Armored Car & Courier Serv., Inc., 301 AD2d 392 [1st Dept 2003].) Here, there is sufficient circumstantial evidence to raise a triable issue of fact as to whether plaintiff fell on the raised flag leading to Jay Realty’s premises.

In arguing that the flag on which plaintiff claims she fell was not a proximate cause of her injuries, Jay Realty also appears to claim that the flag was not a defective condition. However, Jay Realty submits no evidence to support this claim, and instead points to deficiencies in the statements of plaintiff’s and Guiding Eyes’ experts.

Jay Realty misapprehends its burden on this motion. A defendant on a summary judgment motion has the burden of going forward. This burden is not met by pointing to gaps in the plaintiff’s proof. (Valdez v Aramark Servs., Inc., 23 AD3d 639 [2nd Dept 2005] [internal citations omitted].)

As evidenced by the photographs of the flag in question (Ex. C to Jay Realty’s motion), the height differential between the adjacent sidewalk and the flag is not de minimis on its face.

(See Trincere v County of Suffolk, 90 NY2d 976, 977 [1997].) However, defendant does not submit any evidence that the flag complies with applicable government regulations. The burden thus does not shift to plaintiff to raise a triable issue of fact, by expert testimony or otherwise, that the flag constitutes a defective condition. In view of this holding, the court does not reach the sufficiency of plaintiff's or co-defendant's experts' statements.

The court has considered Jay Realty's remaining contentions and finds them to be without merit. On this record, the court holds that Jay Realty does not demonstrate as a matter of law that the complaint and cross-claims are without merit and should be dismissed.

Guiding Eyes moves for summary judgment on the ground that plaintiff is unable to prove negligence on the part of its employee Gardner. It adopts a similar argument to Jay Realty's - namely that plaintiff cannot identify the cause of her fall with certainty. Guiding Eyes does not dispute that it owed a duty of care to plaintiff. Instead, it relies on Gardner's testimony that it was not possible to see the raised flag when walking north on Third Avenue. (Gardner Dep. at 85, 74.) This wholly conclusory assertion is insufficient to eliminate triable issues of fact as to whether Gardner exercised due care in guiding plaintiff during the walk.

It is undisputed that Gardner was acting within the scope of his employment at the time of the accident. Therefore, Guiding Eyes may be vicariously liable for his actions. (See Riviello v Waldron, 47 NY2d 297 [1979].) The branch of defendants' motion for dismissal of the claims against Gardner in his individual capacity is unopposed and will therefore be granted.

Accordingly, it is hereby ORDERED that defendant Jay Realty Corporation's motion for summary judgment is denied; and it is further

ORDERED that defendant Guiding Eyes' cross-motion for summary judgment is granted


to the extent of dismissing the complaint as against defendant James Gardner; and it is further

ORDERED that plaintiff's remaining claims are severed and shall continue; and it is further

ORDERED that plaintiff's motion for a trial preference is granted without opposition.

This constitutes the decision and order of the court.

Dated: New York, New York
November 23, 2011


MARCY FRIEDMAN, J.S.C.

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