

Whalen v Donna Karan Intl., Inc.

2011 NY Slip Op 33075(U)

November 18, 2011

Supreme Court, New York County

Docket Number: 108317/09

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Whalen

INDEX NO. 10837/09

MOTION DATE 9/2/11

MOTION SEQ. NO. 001

- v -

Donna Karen International, Inc., et al MOTION CAL. NO. _____

The following papers, numbered 1 to 23 were read on this motion to/for summary motion

PAPERS NUMBERED

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

1-4

Answering Affidavits — Exhibits _____

5-17

Replying Affidavits _____

18-23

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

NOV 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/18/11


JOAN M. KENNEY J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
JOAN MARIE WHALEN and RICHARD WHALEN,
Plaintiff,

- against -

DONNA KARAN INTERNATIONAL, INC., DKNY
MADISON and PLAZA MADISON ASSOCIATES,
Defendants.
-----X

DECISION AND ORDER

Index Number: 108317/09

Cal.: 9/2/2011

Motion Seq. No.: 001

FILED

KENNEY, JOAN M., J.

NOV 28 2011

Appearances

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COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment:

Papers

Notice of Motion, Affirmation & Exhibits
Affirmation in Opposition & Exhibits
Reply Affirmation

Numbered

1-4
5-17
18-23

In this slip and fall action, defendants Donna Karan International, Inc., DKNY Madison and Plaza Madison Associates (collectively, defendants) seek an Order, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

FACTUAL AND PROCEDURAL BACKGROUND

Briefly, plaintiffs Joan Marie Whalen (Mrs. Whalen) and Richard Whalen (Mr. Whalen, collectively Whalen) allege that, on January 14, 2009, 73-year old Mrs. Whalen fell when she attempted to descend a two-step riser of a staircase at the Donna Karan retail store located at 655 Madison Avenue, New York, New York (the premises). At the time of the accident, the two-step riser (riser), which was allegedly the same color as the ground floor, did not have any handrails attached to it. The accompanying staircase, which was located at the top of the riser, did however have handrails. The top step of the riser opened up to a landing that was placed between the second and ground floors. At the time of Mrs. Whalen's accident, the landing had a couch accessible to customers.

* 3]

Ms. Whalen testified that she descended from the second floor down the steps of the staircase, stopped at the landing, and sat on the couch. After resting, she attempted to descend the riser to the ground floor. Although Mrs. Whalen was aware there was a step before reaching the ground floor, she stated that she missed the final step since there were no handrails or warning signs indicating a second step (*see* Deposition Transcript of Mrs. Joan Marie Whalen, Ex. "A" attached to notice of motion at 28: 14 - 29:3; 34:3 - 35:2).

A DKNY Sales Associate, Mr. Phillip Evelyn (Evelyn), testified that he witnessed Mrs. Whalen's fall (*see* Phillip Transcript, Ex. "H" attached to opposition papers at 12:11-13) and confirmed that there were no warning signs or handrails attached to the riser at the time of her accident (*id.*, at 68:12-19).

In support of their opposition to defendants' motion, Whalen attaches an affidavit of Mr. William Marletta, who is a Board Certified Safety Professional (Marletta) (*see* Marletta Affidavit, Ex. "K" attached to opposition papers). After conducting two inspections of the riser, Marletta concludes that defendants' failure to *inter alia* provide a visual cue for the two-step riser, such as a handrail, warning signs or color contrast with the ground level, amounts to a departure from good and accepted safe practice and New York City Building Code § 27-375 (Marletta Aff. at 4-15).

ARGUMENTS

The defendants argue that the instant complaint should be dismissed on the sole ground that they owed no duty to warn Mrs. Whalen of the riser since, as a matter of law, the riser was an open and obvious condition and therefore, not an inherent hazard.

In opposition, Whalen contends that the instant motion should be denied because: 1) triable issues of fact exist as to whether the riser constituted an open and obvious condition since defendants failed to attach any signs or handrails to the riser; and 2) even if this Court determines that the riser constitutes an open and obvious condition as a matter of law, this determination does not preclude a finding of liability against defendants for their alleged failure to maintain the riser in a safe condition.

DISCUSSION

“[T]he 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 (*see Paz v Trump Plaza Hotel and Casino*, 28 AD3d 212, 213 [1st Dept 2006]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). This “drastic remedy” should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable; issue-finding, rather than issue-determination, is the key to the procedure (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

A determination that a condition is open and obvious merely eliminates a landowner’s duty to warn of the hazard but does not, however, eliminate the broader duty to maintain the premises in a reasonably safe condition. Rather, “proof that a dangerous condition is open and obvious does not preclude a finding of liability against the landowner for the failure to maintain a property in a safe condition but is relevant to the issue of the plaintiff’s comparative negligence” (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69 [1st Dept 2004]).

Defendants have failed to meet their *prima facie* showing of entitlement to dismissal of the complaint. Even if the riser constitutes an open and obvious condition as a matter of law, defendants failed to argue and eliminate all triable issues of fact that they did not violate their broader duty to maintain the riser in a reasonably safe condition.

Nonetheless, triable issues of fact exist as to whether the riser constitutes an open and obvious condition. While it is well-settled that a condition is open and obvious if any observer, reasonably using his or her senses, would see the condition (*Tagle v Jakob*, 97 NY2d 165, 170 [2001]), the test incorporates a reasonableness standard, and as such, it is “fact-specific and usually presents a question for resolution by the trier of the fact” (*see Centeno*, 5 AD3d at 211). Here, Mrs. Whalen testified to defendants’ failure to attach a handrail or warning sign to the two-step riser. This testimony raises triable issues of fact as to whether an observer, reasonably using his or her senses,

[* 5]

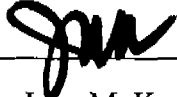
would have seen the final step (*see Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92-93 [1st Dept 2011]). Moreover, Marletta's un rebutted affidavit provides numerous grounds to support the conclusion that the riser may not have been an open and obvious condition. Specifically, Marletta's assertions, which are solely opposed by an attorney affirmation in defendants' reply papers, are sufficient to raise a triable issue of fact that the lack of signs or handrails coupled with the difficulty in perceiving the riser's small change in elevation departs from acceptable standards of care. Accordingly, it is:

ORDERED that defendants Donna Karan International, Inc., DKNY Madison and Plaza Madison Associates's motion for summary judgment is denied, in its entirety; and it is further

ORDERED that the parties are directed to proceed to their scheduled mediation.

Dated: November 18, 2011

E N T E R



Hon. Joan M. Kenney, JSC

FILED

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