Gardner v Commack Medical Arts Assoc., LLC
2012 NY Slip Op 30231(U)
January 6, 2012
Sup Ct, Suffolk County
Docket Number: 08-23464
Judge: John J.J. Jones Jr
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SHORT FORM ORDER

INDEX No. 08-23464
CAL. No. 10-02335OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 4-6-11
ADJ. DATE 8-3-11
Mot. Seq. # 001 - MD

---X
KAREN GARDNER and DOUGLAS GARDNER, :
Plaintiffs, :

-against- :

COMMACK MEDICAL ARTS ASSOC., LLC and :
ADVANCED DERMATOLOGY, P.C., :
Defendants. :
---X

AMIDEO NICHOLAS GUZZONE & ASSOCS.
Attorney for Plaintiffs
2450 Middle Country Road
Centereach, New York 11720

MORENUS, CONWAY, GOREN & BRANDMAN
Attorney for Defendant Commack Medical Arts
58 South Service Road, Suite 350
Melville, New York 11747

BELLO & LARKIN
Attorney for Defendant Advanced Dermatology
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 18 - 28 ; Replying Affidavits and supporting papers 29 - 31 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Commack Medical Arts Associates, LLC seeking summary judgment dismissing the complaint and all cross claims against it is denied.

Plaintiff Karen Gardner commenced this action against defendants Commack Medical Arts Associates, LLC, s/h/a Commack Medical Arts Assoc., LLC, and Advanced Dermatology, LLC, to recover damages for injuries she allegedly sustained as a result of a slip and fall on an internal stairway in the southside entranceway of the Commack Medical Building, which is located at 160 Commack Road in Commack, New York. Plaintiff, by her complaint, alleges, among other things, that on September 4, 2007, she slipped and fell on the internal stairway between the street level and the second level of the southside entranceway of the subject premises while ascending the staircase on her way to her daughter's appointment at Advanced Dermatology, LLC. The subject premises is owned by defendant Commack Medical Arts Associates, LLC (hereinafter referred to as "Commack"). At the time of the accident, defendant Advanced Dermatology, LLC (hereinafter referred to as "Advanced Dermatology") leased a second floor office suite from Commack. Plaintiff's husband, Douglas Gardner, instituted a claim for loss of services.

Commack now moves for summary judgment on the basis that plaintiff is unable to demonstrate that it had actual or constructive notice of the alleged defective condition of the internal stairway, or that it created said condition. Commack, in support of the motion, submits copies of the pleadings, the parties' deposition transcripts, and the affidavit of Stuart Polisner, a managing partner of Commack. Commack also submits the affidavit of its expert, Denise Bekaert, R.A., A.I.A. Plaintiff opposes the motion on the ground that there are material issues of fact as to whether Commack created or had notice of the alleged defective condition on the internal stairway that resulted in her injury. Plaintiff also contends that the stairway was inadequately lit, which created an unsafe condition, preventing her from observing the water on the steps, and contributed to the accident's occurrence. In opposition to the motion, plaintiff submits the deposition transcript of nonparty witness Kristin Gardner, copies of the building permits for the subject premises, and photographs of the accident site. Plaintiff also submits the affidavits of her experts, Kenneth Phalen, an architect, and Werner Laag, a board certified safety expert.

A court's task on a motion for summary judgment is issue finding rather than issue determination (*see* ***Sillman v Twentieth Century Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see* ***Boyce v Vazquez***, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Therefore, in determining a motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). In the first instance, the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injury (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Kievman v Philip***, 84 AD3d 1031, 924 NYS2d 112 [2d Dept 2011]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]). A landowner has a duty to maintain his or her property in a reasonably safe condition in view of the existing circumstances (*see* ***Tagle v Jacob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Demshick v Community Hous. Mgt. Corp.***, *supra*). The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk, and the forseeability of a potential plaintiff's presence on the property (***Galindo v Town of Clarkstown***, 2 NY3d 633, 636, 781 NYS2d 249 [2004] *quoting* ***Kush v City of Buffalo***, 59 NY2d 26, 29-30, 462 NYS2d 831 [1983]; *see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]).

Additionally, to impose liability upon a defendant in a trip and fall action, there must be evidence that the defendant either created the condition or had actual or constructive notice of it (*see* ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v Century 21 Dept. Stores,***

LLC, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]). Photographs may be used to prove constructive notice if they were taken close in time to the accident and if there is testimony that the conditions depicted in the photographs are substantially the same as those that existed on the day of accident (*see* ***Batton v Elghanayan***, 43 NY2d 898, 203 NYS2d 717 [1978]; ***Bravo v 564 Seneca Ave. Corp.***, 83 AD3d 633, 922 NYS2d 88 [2d Dept 2011]; ***Gennaro v Cord Meyer Dev. Co. & LLC***, 57 AD3d 725, 871 NYS2d 214 [2d Dept 2008]). A general awareness of that a dangerous condition might exist on one's premises is legally insufficient to charge a defendant with constructive notice of such condition (*see* ***Gordon v American Museum of Natural History***, *supra*; ***Joseph v New York City Tr. Auth.***, 66 AD3d 842, 888 NYS2d 533 [2d Dept 2009]; ***DeJesus v New York City Hous. Auth.***, 53 AD3d 410, 861 NYS2d 31 [2d Dept 2008]).

Plaintiff testified at an examination before trial that on the day of her accident she was taking her daughter to an appointment at Advanced Dermatology, that she had been to the building a couple of months before for an appointment with her daughter, and that she used the southside entranceway into the building on her previous visits to Advanced Dermatology, which was located on the second floor of the building. Plaintiff testified that the hallway and stairway leading up to Advanced Dermatology are dark and dimly lit, and that she does not know what type of lighting is used to illuminate the entranceway and stairwell. She testified that the stairway is long and steep, and that there is a handrail on the right side of the staircase. Plaintiff explained that as she was ascending the steps she slipped on the third step, flipped over and fell down the stairs, landing on the mat at the bottom of the staircase. She testified that as she began to fall she reached out with her right hand, because her left arm was in a sling, to grab the handrail, but there was no handrail located on the left side of the staircase. She testified that even though she did not see the water on the steps until after she had fallen, that the steps were extremely slippery, and caused her foot to slip off the third step. Additionally, plaintiff testified that the mat at the bottom of the steps was wet, and that her hands, pants, and shoes also were wet after the fall. She testified that she reported the incident to Advanced Dermatology, but was not given an accident report to fill out or offered any assistance. Plaintiff further testified that she is unaware of anyone else having had an accident on the staircase and that she did not know how long the water had been on the mat.

Stuart Polisner, testifying on behalf of Commack at an examination before trail, stated that he is one of the three managing partners for the subject premises, that his duties required him to "field phone calls when there were complaints or problems within the building," that Commack purchased the subject premises in 1975, and that Advanced Dermatology was one of its tenants, but its lease expired in 2008, and was not renewed. Polisner testified that he does not maintain regular office hours, but he generally arrives at the building between 12:00 p.m. and 1:30 p.m. most days. Polisner testified that Commack employed an independent cleaning service to clean all common areas and entrances, including the subject stairwell, every night, and that the cleaning service was responsible for the maintenance and cleaning of the mats that were placed at the entryways to the building. He stated that the cleaning service began cleaning the building at 9:00 p.m., every night, and that no cleaning was performed during business hours, unless one of the tenants made a complaint. Polisner explained that the light bulbs in the

lighting fixtures, which were located in the vestibule and at the top of the staircase on the second floor, were changed by the cleaning service or the electrician, if he was in the building and a bulb had blown. Polisner testified that the building was completely renovated in the Spring of 2007, including the subject stairway. He stated that the floor covering of the stairway was replaced, that a commercial nonslip tile was placed on the steps, and that the handrail of the staircase was painted. Polisner testified that he never received any complaints from Advanced Dermatology or anyone else about the southside entranceway, vestibule or staircase, and that he does not keep records of the complaints made by tenants. Additionally, he testified that he had not received any complaints about the treading that was placed on the steps of the stairway during the renovations or that the steps were too slippery. Polisner further testified that there was a leak from the air conditioning pipe in the ceiling above the stairway, which was later repaired, that he personally wiped up the water that was leaking onto the steps, and that he was unsure of the date of the leak, but believes it occurred after the subject accident.

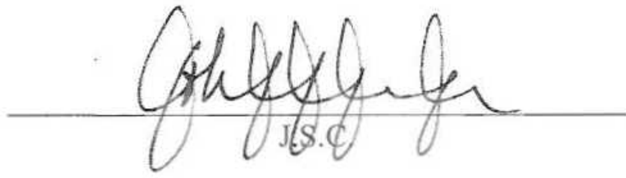
Based upon the adduced evidence, Commack failed to make a prima facie showing of its entitlement to judgment as a matter of law (*see* ***Winegrad v New York Umiv. Med. Ctr.***, *supra*; ***Ramirez v Saka***, 76 AD3d 673, 906 NYS2d 609 [2d Dept 2010]). While Commack's submissions established that it did not have actual notice of the alleged dangerous condition of the stairway on its premises, its submissions failed to eliminate all triable issues of fact as to whether it had constructive notice of said condition. Polisner testified that he had not received any complaints regarding the condition of the stairway, vestibule, or hallway prior to plaintiff's complaint, and plaintiff testified that she was unaware of any one having an accident prior to her accident (*see* ***Mauge v Barrow St. Ale House***, 70 AD3d 1016, 895 NYS2d 499 [2d Dept 2010]). However, despite the fact that Polisner testified that his duties, as one of the managing partners of Commack, required him to "field phone calls regarding complaints about the building," he failed to testify as to the last time that the subject staircase had been cleaned or inspected before plaintiff's fall, or to demonstrate that the condition that plaintiff alleges caused her injury existed for an insufficient length of time for Commack to discover and remedy said condition (*see* ***Cummins v New York Methodist Hosp.***, 85 AD3d 1082, 926 NYS2d 313 [2d Dept 2011]; ***Bernardo v 444 Route 111, LLC***, 83 AD3d 753, 921 NYS2d 274 [2d Dept 2011]; ***Perez v 655 Montauk, LLC***, 81 AD3d 619, 916 NYS2d 137 [2d Dept 2011]; ***Mei Xao Guo v Quong Big Realty Corp.***, 81 AD3d 610, 916 NYS2d 155 [2d Dept 2011]; ***McPhaul v Mutual of Am. Life Ins. Co.***, 81 AD3d 609, 915 NYS2d 870 [2011]). In fact, Polisner testified that he neither makes periodic inspections of the building nor inspects the building when he arrives at the office. In addition, Polisner testified that the subject premises is not cleaned during business hours unless a complaint is made, and that no records of any complaints are maintained. Further, Polisner testified that he did not know how many bulbs or the wattage of the bulbs in the light fixtures located in the vestibule area and in the hallway on the second floor.

Furthermore, the affidavit of Commack's expert is conclusory and unsubstantiated and, therefore, insufficient to meet Commack's burden on the motion (*see* ***Schrader v Sunnyside Corp.***, 297 AD2d 369, 747 NYS2d 26 [2d Dept 2000]; *compare* ***Carmona v Mathisson***, 54 AD3d 633, 865 NYS2d 35 [1st Dept 2008]). Denise Bekaert's conclusions that the subject stairway complied with the governing portions of the 2002 Building Code for New York State, Appendix K, that the staircase was in a safe condition, and that the fluorescent light fixtures in the ceilings of the vestibule and the second floor hallway provided code compliant illumination were insufficient, as she failed to state what Appendix K of the 2002 Building Code provides and what code she was referring to when she opined that the light

fixtures provided code complaint illumination (*see* ***Sarmiento v C & E Assoc.***, 40 AD3d 524, 837 NYS2d 57 [1st Dept 2007]; *compare* ***Masillo v On Stage, Ltd.***, 83 AD3d 74, 921 NYS2d 20 [1st Dept 2011]; ***Reid v Schalmont School Dist.***, 50 AD3d 1323, 856 NYS2d 691 [3d Dept 2008]).

Having determined that Commack failed to meet its burden, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***Fredette v Town of Southampton***, 73 AD3d 849, 902 NYS2d 119 [2d Dept 2010]; ***Goldenfeld v Euro Comfort Furniture, Inc.***, 48 AD3d 515, 852 NYS2d 254 [2d Dept 2008]). Accordingly, Commack's motion for summary judgment is denied.

Dated: 6 Jan. 2012



J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION