Rosado v 100-120 Hugh Grant Circle Realty, LLC
2012 NY Slip Op 33468(U)
March 14, 2012
Sup Ct, Bronx County
Docket Number: 310350/08
Judge: Mark Friedlander
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3/19/12

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

MILDRED ROSADO, as Administratix of the Estate of JULIO ROSADO,

Plaintiffs,

-against-

100-120 HUGH GRANT CIRCLE REALTY, LLC BLUE STAR CONVENIENCE & DONUT, SHAREEF MOFLEHI, Individually and d/b/a BLUE STAR CONVENIENCE & DONUT, THREE STAR CONVENIENCE STORE, AHMED ALHAJAJI, Individually and d/b/a THREE STAR CONVENIENCE STORE,

Defendants.

DECISION/ORDER
Index No. 310350/08

Present:
HON. MARK FRIEDLANDER
J.S.C.

The following papers numbered 1 to 12 read on this motion on the calendar of July 8, 2011

Papers Numbered

Notice of Motion, Order to Show Cause, Affidavits and Exhibits Annexed.....1-2.....
Notice of Cross-Motion, Order to Show Cause, Affidavits and Exhibits Annexed.....3-4.....
Answering Affidavits and Exhibits Annexed.....5,6,7,8.....
Replying Affidavits and Exhibits Annexed.....9,10,11,12 ...

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision.

Dated: 3/14/12

MARK FRIEDLANDER, J.S.C.

 FILED Mar 19 2012 Bronx County Clerk

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Defendants.

MEMORANDUM DECISION/ ORDER
Index No. 310350/08

HON. MARK FRIEDLANDER:

Defendant 100-120 Hugh Grant Circle Realty LLC ("HGC" or "owner") moves for summary judgment dismissing plaintiff's claims against it in this "trip and fall" action. HGC also seeks dismissal of cross-claims against, as well as indemnification from its co-defendant, but the Court notes that HGC's notice of motion contains no reference to its application for indemnification, such demand being limited to the text of the supporting affirmation.

Defendant Ahmed Alhajaji, sued individually and d/b/a Three Star Convenience Store (collectively "TSCS" or "tenant") cross-moves for similar relief, seeking dismissal of plaintiff's claims, and any cross-claims, against it. TSCS also opposes HGC's demand for indemnification. The remaining defendants in the caption, Blue Star Convenience & Donut, and Shareef Moflehi, have not appeared herein, and no part of the motion or cross-motion is specifically addressed to them. (Based on the deposition testimony, it appears that Shareef Moflehi may have been a manager of tenant's business, but on shift duty at a time other than that of the

accident; and "Blue Star," an appellation visible in exhibits as the writing on the store's awning, may have been a trade name or an earlier corporate name).

Plaintiff Julio Rosado (hereinafter "JR"), an 85 year old man using a cane, rounded a corner and walked in front of the store occupied and managed by TSCS, on property owned by HGC. In front of the store's entrance, he stopped and turned briefly to let others pass him, and then tripped and fell purportedly over a rubber mat, approximately one inch to one and a half inches in height, which ran from inside the store entrance to a point on the sidewalk that was "a little" distance, or several feet (depending on whose deposition is quoted), from the store's door. As a result of the injuries allegedly sustained in the fall, plaintiff brought this action. Subsequently, JR died, and this action is now maintained by his administratrix.

There is some indication that JR may have been ill with cancer at the time of his accident, but he may also have been in remission. His eyesight may have been poor. After falling, he told the owner of TSCS that he felt dizzy, but this feeling may have been induced by his fall, rather than a cause of it. Plaintiff argues that facts relating to JR's health constitute disputed facts precluding summary judgment, but the Court finds that any lack of clarity as to JR's health is irrelevant to the issues presented here, and has no effect on whether summary judgment is appropriate. Any argument as to the connection between the purported health of JR and this accident would constitute sheer speculation, and will not be further considered.

In its motion, HGC argues that it was an out of possession owner, and cannot be held responsible for the mat placed by its tenant. It denies any knowledge of the mat, and points out that the mat was not a structural part of its premises. In the event that it remains in the action, it seeks, as alternative relief, indemnification from TSCS, based on the lease provisions providing for same.

In its cross-motion, TSCS expands upon those arguments of HGC which assert that the mat itself was not a danger. There is no claim that the mat was curled up, torn, or defective in any way.

Prior to considering the further papers submitted by the parties, it must be mentioned that the issues

raised hereinafter are strongly influenced by a small portion of the testimony of TSCS's witness, Anis Nagi. At pages 30-32 of his deposition, he was asked why the mat was placed over the threshold of his store, and he explained that there was a step at the entrance to his store, requiring customers to lift their legs in order to enter, as his store was at a higher level than the sidewalk. In order to make it easier and safer to "step" up or down when accessing his store, he placed the mat over the step and out into the street.

Plaintiff's opposition to HGC's motion stresses HGC's non-delegable responsibility, as a landlord, for the condition of the sidewalk in front of his premises, under the New York City Administrative Code, Section 7-210. Plaintiff concedes that the mat itself contained no defect, but argues that its placement on the sidewalk was impelled by the presence of the step, which was a structural item. According to plaintiff, once the mat covered the step, the creation of a difference in elevation by the combination of the step and mat constituted an obstruction of the sidewalk. Plaintiff thereafter argues extensively that case law shows that there is no minimal height differential for finding liability. Courts have said that each case turns on its specific facts. It is noted, though, that the cases cited by plaintiff are primarily related to differences in the height of sidewalk slabs, and not to softer raised surfaces such as mats or rugs. Plaintiff also argues that TSCS was making a special use of the sidewalk when it placed its mat upon it, thus subjecting its acts to greater scrutiny. Plaintiff further seeks to argue that HGC is responsible for this special use, because TSCS was required to elicit HGC's permission for alterations. The last argument, though, is not persuasive, because there is no reason to believe that any tenant would consider placement of a mat to be an "alteration" requiring landlord approval.

TSCS has also served opposition to HGC's motion, stating its agreement with plaintiff that HGC, as landlord, was responsible for the condition of the sidewalk, and that it therefore had primary responsibility for the step which, in turn, necessitated the mat. The presence of the step was a structural issue, which HGC was required to attend to, by proper maintenance. TSCS attacks HGC's claim of lack of notice, by pointing to the requirement that a landlord show evidence of reasonable inspections around or before the time of the presence

of a condition. Here, the deponent for HGC testified that he had not visited the area for years, and did not generally check on the condition of the store. Thus, he of course had no knowledge of the mat, but, as TSCS argues, he also would not have known if the sidewalk was degraded, and, in this case, could not know whether or not the step presented a problem which had to be addressed. TSCS asserts that it owes no indemnification to its landlord, because its mat was not the problem, but, rather, the step was the problem. Finally, TSCS contends that it owes no contractual indemnification under any circumstances, because, under the lease it signed, the landlord was not HGC, but another party entirely.

In reply to TSCS's arguments, HGC asserts that it is not liable for a purported defect in any sidewalk, because none is claimed by plaintiff. Rather, plaintiff claims only that a mat caused JR's accident. HGC maintains that it is speculative to assert that there was anything wrong with the sidewalk. HGC also defends its rights under the lease, by pointing out that the premises was originally owned by an individual, and that, following the death of such individual, his widow signed the lease with TSCS, on behalf of the estate of the deceased owner. Thereafter, the heirs of the deceased owner formed an LLC, to hold the premises, and named it HGC. HGC was thus the successor to the party who entered into the lease. Various proofs of these transactions are attached as exhibits. The Court finds the proofs to be satisfactory, and finds no issue as to the ability of HGC to enforce the terms of the lease.

Five additional affirmations were served by the three parties hereto, but none of them contains significant arguments which are not already outlined supra, or which would affect the result reached herein. Plaintiff's further submission, though, did contain additional citations to case law, which will be considered infra.

In the final analysis, resolution of the issues in these applications turns on whether the cause of JR's fall is viewed as the presence of a mat on the sidewalk, or as a defect in the sidewalk. Although plaintiff attempts to characterize the action as premised on a sidewalk defect, there is no evidence presented to support such

characterization. The totality of the evidence shows only that there was a step leading from the sidewalk to the store level. There is no indication in these papers that such step protruded onto, or was part of, the sidewalk. It need not be belabored that the presence of a step at the entrance to a store has never been considered a defect or hazard, and certainly not a defect in a sidewalk.

Furthermore, the testimony of the store's deponent does not establish that there was ever any demonstrable need for the mat, or that any specific safety issues impelled its placement. Rather, the witness merely stated that he thought it would be helpful to put the mat there. Thus, the mat's presence has no connection with the sidewalk's condition, and only a speculative connection to any issue involving the step.

For the above reasons, plaintiff's claim that there was somehow a defect in the sidewalk is simply untenable. There remains the question, however, of whether the placement of a mat upon the sidewalk created a tripping hazard. Most of plaintiff's case citations are of generic precedent relating to the impossibility of setting a specific height amount for a "tripping hazard." This rule is well known, but not entirely helpful here.

By contrast, TSCS presents a decision directly on point. In Denker v. Century 21, 55 A.D.3d 527, the court found that a "carpet mat" on the sidewalk in front of a store did not constitute a dangerous condition, and dismissed the action, reversing the trial court. The sole difference between that case and the instant one is that defendant there presented evidence that it inspected or cleaned the carpet every 90 minutes. However, this is not a relevant distinction, because a carpet mat may curl up and require straightening on an ongoing basis. In our case, the photos show a more rigid rubber mat which does not have to be monitored as steadily to ensure that it is lying flat. Second, there is no allegation here that the mat was not flat, or that any problem in the mat itself was the cause of JR's fall. Rather, it was the mere presence of the mat that is cited as the basis of this action, and thus no recent inspection would have affected its purported role.

TSCS also cites Mansueto v. Worster, 1 A.D.3d 412, in which the court held that the presence of a mat, composed of a carpet remnant, in a hallway outside of a tenant's apartment, did not, of itself, constitute a

dangerous condition. Plaintiff may argue that this decision is distinguishable on the ground that the mat was in a hallway, rather than on a sidewalk. However, the sole basis for that argument would be that a plaintiff might not expect to come upon a mat lying upon a sidewalk, while mats in front of apartments are ubiquitous. However, this argument loses its persuasive force when it is recalled that JR and two of his family members all testified that they were familiar with the existence of the mat before the accident. In any event, the decision in Denker, supra, deals directly with a sidewalk.

The only relevant case cited by plaintiff is Ostermeiers v. Victorian House, 121 A.D.2d 611, which also deals with a sidewalk carpet. There, the court found that the carpet was not only a danger, but a nuisance. However, it must be noted that the decision of the appellate court came after a full trial, at which evidence may well have been presented establishing the danger in that particular case. Furthermore, the accident there occurred three weeks after a New York City inspector had issued a citation to defendant relating to the presence of the carpet. The carpet's size and condition are not specified in the decision, but, given the circumstances, it cannot be assumed that the condition complained of here bears any resemblance to that in Ostermeiers. Finally, although all three decisions discussed supra issued from the Second Department, the latter is more than a quarter century old, while the two cited earlier are from the past decade.

It cannot be gainsaid that the placement of mats is so frequent, for a whole variety of reasons, that a rule establishing them as intrinsically hazardous would have enormous and mischievous consequences. Thus, a mat which is not shown to be curled, torn or otherwise defective cannot be said to be a danger. Placing such mat on a sidewalk does not appear to alter this rule, at least in view of the more recent decision in Denker.

For the purposes of the instant action, the fact that the height differential between the street and the store caused the store owners to decide to lay down a mat has no relevance to whether or not the mat was a hazard. There is no allegation that JR tripped on that part of the mat which was elevated so as to reach the top of the step. Plaintiff's claims relate only to the thickness of the mat as it rested on the street. Because JR's fall was

allegedly precipitated by that portion of the mat which was lying flat on the sidewalk, the height of any other portion, and the presence or absence of the step itself, has no role in this matter.

Most of the cases cited by plaintiff are either not directly on point, or support the arguments of movants. Ress v. Incorporated Village of Hempstead, 276 A.D.2d 681, refers to an unspecified trivial defect in a sidewalk, and actually rules against the plaintiff. Argenio v. MTA, 277 A.D. 165, described by plaintiff as a similar case, relates to a situation in which the crowd around plaintiff obscured the hole in the ground. There is no argument here that plaintiff's line of sight to the street was obstructed by crowds. Granville v. New York, 211 A.D.2d 195, involves a raised step which "protruded" onto the sidewalk, and, as a result, may have caused cracks in the sidewalk, one of which caused that plaintiff's fall. This has no relevance to our scenario, in which the step is not claimed to have protruded, and plaintiff's attempt to connect the cited case to an imaginary "rug/mat" is somewhat misleading. Torres v. NYC, 32 A.D.3d 347, while discussing the triviality of a sidewalk defect, similarly rules against plaintiff. Finally, Delaney v. Philhern, 280 N.Y. 461, is totally inapposite, describing a situation in which construction piping was laid across a sidewalk. What remains clear is that an object of very limited height on the ground must, in order to incur liability, constitute a "trap or snare." There is absolutely nothing about a flat and rigid mat which has this connotation, and the decision in Denker, cited supra, confirms such view.

It should be noted that the cases cited by HGC in its papers are, for the most part, no more relevant than those mentioned by plaintiff. They relate to indoor mats in places such as dance studios, offices and supermarkets (or to an aluminum ramp), and thus provide little guidance as to whether a mat on a sidewalk would constitute a special danger. However, given the more specific applicability of the precedent cited by TSCS, the Court feels constrained to conclude in favor of movant and cross-movant.

It must be conceded, for the sake of a complete discussion, that, if the Court's view of the above issue is in error, HGC's other arguments in support of its motion might also fail. Its claims to be a typical "out-of-

possession" landlord are weakened by the presence of a mat - not inside a rented premises - but outside on the sidewalk, in full view of any passer-by. Combined with the admission of HGC's deposition witness that he never bothered to pass by the premises, it might seem that HGC would have difficulty evading a claim of constructive notice as to either the mat, or, if it were held to be involved, the step. In general, there would seem to be a reason for a landlord to check rental properties regularly, if only to assure that the sidewalks remain safe. However, these issues are not reached because they are rendered moot by the conclusions set forth above.

In a similar vein, it is noted, for the purpose of completeness, that all of the cited cases on which this Decision relies issue from the Second Department. It is not clear why there seem to be no authoritative pronouncements on the subject from the First Department. Is it possible that placing mats on sidewalks is simply more culturally acceptable in the outer boroughs and suburban counties than in Manhattan and Bronx? In any event, where clear precedent issues from any appellate division, it is authoritative, in the absence of any contrary ruling from this department. If, however, plaintiff is truly persuaded that the result reached here is unreasonable, it would not be frivolous to seek possible vindication from the First Department. While this Court does not necessarily encourage appeals from its rulings, neither would it be chagrined to learn that our own appellate division has a contrary view to that of the cited authorities above.

By reason of the foregoing, the motion and cross-motion are granted, and the claims of plaintiff are dismissed, except that such portion of HGC's motion as seeks indemnification from TSCS is denied as moot.

This constitutes the Decision and Order of the Court.

Dated: 3/14/12

MARK FRIEDLANDER, J.S.C.