

Pinto v Board of Mgrs. of St. Tropez Condominium

2013 NY Slip Op 32897(U)

November 8, 2013

Supreme Court, New York County

Docket Number: 107964/2010

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PRESENT: _____
Justice

PART 12

Index Number : 107964/2010
PINTO, ELLEN

INDEX NO. 107964/10

vs
BOARD OF MANAGERS OF THE
Sequence Number : 005
DISMISS ACTION

MOTION DATE _____
MOTION SEQ. NO. 005

The following papers, numbered 2 to 6D, were read on this motion to for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

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

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

Dated: 11-8-13

[Signature]
J.S.C.
BARBARA JAFFE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
ELLEN PINTO,

Plaintiff,

- against -

Index No. 107964/10

Mot. seq. no. 005

DECISION AND ORDER

THE BOARD OF MANAGERS OF THE ST. TROPEZ
CONDOMINIUM, JOHN/JANE DOES 1-20 IN THEIR
OFFICIAL CAPACITIES AS MEMBERS OF THE
BOARD OF MANAGERS OF THE ST. TROPEZ
CONDOMINIUM, TROPEZ LEASEHOLD, LLC AND
GUMLEY-HAFT LLC,

Defendants.

-----X
BARBARA JAFFE, J.:

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Defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint against them. Plaintiff opposes and cross moves pursuant to CPLR 3212 for an order granting her partial summary judgment as to liability, striking defendants' seventh through ninth affirmative defendants, and striking each of defendants' cross-claims.

I. BACKGROUND AND UNDISPUTED FACTS

Plaintiff is a shareholder in the St. Tropez Condominium, a residential building located at 340 East 64th Street in Manhattan. Defendant Gumley-Haft LLC is the managing agent for defendant Board of Managers of the St. Tropez Condominium (Board).

On the evening of April 28, 2010, a meeting for unit owners was held by Board in a

vacant commercial space on the ground floor of the condominium building. Chairs were set up on the finished floor; a pink paper construction runner covered the unfinished concrete perimeter of the seating area. Plaintiff alleges that while she was walking around the perimeter on the runner, she fell and injured herself. (NYSCEF 36, 41).

On or about May 25, 2011, plaintiff commenced this action by serving defendants with a summons and complaint, alleging that she had tripped on a hole in the concrete floor. (NYSCEF 2).

At an examination before trial (EBT) held on May 22, 2012, plaintiff testified that after she entered the space along with other shareholders, she was “just about to turn around and tell the woman behind [her] to be careful because [the floor under the paper] was all bumpy, really badly bumpy” when her foot sunk into and got caught in a hole under the paper. She was unable to tell how much of her foot sunk into the hole, and never saw the hole because it was covered by the pink paper and she never looked under it. (NYSCEF 37, Exh. C, at 50-54).

Before her accident, plaintiff had looked through the windows of the space every day, but only perceived that it was “a mess . . . unfinished. . . [and] that most of the flooring was unfinished.” (*Id.*, at 66-68). When she entered the space the evening of her accident, she did not know that she was walking on the unfinished portion of the floor. (*Id.*, at 68).

At an EBT held on August 23, 2012, Board’s treasurer, Marc Feuer, testified that the concrete surface of the floor had the texture of a city sidewalk; he was aware of no holes or rough areas on it and had noticed none in the space where plaintiff had tripped. He also testified that he was unaware if plaintiff ever told anyone how or why she fell. He characterized the runner as being made of heavy gauge construction paper, placed on the concrete floor by building

maintenance workers to beautify the space. (NYSCEF 37, Exh. D, at 16, 22, 29-31).

By affidavit dated February 28, 2013, plaintiff stated, in pertinent part, that as she walked on the paper, she felt that the surface underneath the paper was “uneven,” and that she then fell into a “large hole” that was concealed by the paper. (NYSCEF 42).

II. ANALYSIS

“The 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 eliminate any material issues of fact from the case.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

A. Defendants’ motion

Defendants argue that having failed to look under the runner to see what had caused her to trip, and being unable to describe the purported defect, plaintiff’s characterization of the defect as a hole fails as unduly speculative and insufficient, warranting the dismissal of her complaint. They also maintain that absent a duty to plaintiff, the complaint as against Gumley-Haft LLC must be dismissed. (NYSCEF 36).

In opposition, plaintiff explains that she did not testify about seeing a defect because the defect was concealed by the paper runner and that she otherwise identified the cause of her fall, having testified at her deposition that she had felt her foot sink into the hole. And, referring to photographs of the floor beneath the runner, she notes a depression in the area of the floor where she had walked. (NYSCEF 42, 44). Plaintiff does not, however, address defendants’ motion as

to Gumley-Haft LLC. (NYSCEF 41).

In reply, defendants assert that plaintiff's affidavit must be disregarded as feigned, given discrepancies between it and her deposition. (NYSCEF 53).

A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]).

Here, defendants only point to a gap in plaintiff's case, namely, her alleged failure to identify the defect on which she tripped. Thus, they have not established entitlement to a dismissal. Even if they had, plaintiff more than adequately raises a triable issue of fact. That she did not see the defect is of no moment, having testified that she felt it. Any discrepancy between plaintiff's deposition and affidavit does not warrant disregard of the affidavit.

Absent any opposition to the motion respecting Gumley-Haft LLC, and given plaintiff's concession at oral argument on the motion that she does not oppose the dismissal of the complaint as to Gumley-Haft LLC, it is dismissed.

B. Plaintiff's cross motion

Although untimely filed beyond the 60-day period within which summary judgment motions must be made, plaintiff observes that her cross motion for partial summary judgment is based on the same facts on which defendants based their motion, and thus, the issues are already before me and absent any prejudice to defendants, there exists good cause to review her motion.

Substantively, plaintiff observes that as defendants concealed the defect with the construction paper, they were negligent, and as she could not have seen the concealed hole, she cannot be held comparatively negligent. She also maintains that the affirmative defenses (that the defect was open and obvious, trivial, or that she assumed the risk of falling) thereby fail. (NYSCEF 49).

In opposition, defendants argue that the cross motion should be denied as untimely, contending that the motion to strike the three affirmative defenses is not based on the same facts addressed in their motion for summary judgment. They also assert that plaintiff fails to set forth a *prima facie* case, claiming that she had been aware of the “open and obvious” condition of the unfinished cement floor, that the defect was “trivial” based on her inability to describe it, and that she assumed the risk of tripping by having turned around to speak with someone immediately before she fell. They deny that plaintiff identified the large crack depicted in Exhibit J as the one in which she tripped, and point to Feuer’s testimony that he had noticed no holes in the area in which plaintiff fell, heard no report from plaintiff or anyone that she had tripped in a hole, and saw plaintiff sitting in a different area, as raising triable issues of fact, and reiterate their claim that plaintiff’s testimony about the hole is too speculative to warrant a trial. (NYSCEF 56).

In reply, plaintiff takes issue with defendants’ arguments. (NYSCEF 60).

Plaintiff sets forth, *prima facie*, that defendants were negligent in concealing from view a defect that, were it not concealed by the construction paper, would have been open and obvious and far from trivial in nature. That she had seen the cement surface through the exterior building windows during her daily walks does not raise a triable issue as to whether she should have known about the specific defect and thereby assumed the risk of falling in it, or whether she can

be held comparatively negligent.

Although Feuer's testimony as to his lack of awareness of a hole does not entitle defendants to summary judgment, it suffices to raise an issue of fact as to the existence of the hole.

III. CONCLUSION

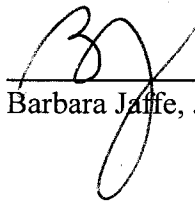
Accordingly, it is hereby

ORDERED, that defendants the Board of Managers of the St. Tropez Condominium, John/Jane Does 1-20 in their Official Capacities as Members of the Board of Managers of the St. Tropez Condominium, Tropez Leasehold, LLC's motion for summary judgment is denied; it is further

ORDERED, that defendant Gumley-Haft LLC's motion for summary judgment is granted and the complaint and cross claims against it are severed and dismissed, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff Ellen Pinto's motion for summary judgment is denied.

ENTER:



Barbara Jaffe, JSC

DATED: November 8, 2013
New York, New York