

Serra v 9th Ave. Royal Deli

2013 NY Slip Op 33505(U)

November 26, 2013

Supreme Court, New York County

Docket Number: 103053/10

Judge: Paul Wooten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.



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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ENID SERRA and RUBEN SERRA, Sr.,

Plaintiffs,

- against -

9th AVENUE ROYAL DELI, BOBGJU SHIM,
ANN HWA SHIM and TITAN 360, INC.,

Defendants.

INDEX NO. 103053/10

MOTION SEQ. NO. 003

FILED

NOV 29 2013

COUNTY CLERK'S OFFICE
NEW YORK

The following papers were read on this motion and cross-motion by defendants for summary judgment pursuant to CPLR 3212.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

In this personal injury action, Enid Serra (plaintiff) brings this action against defendants for damages for injuries sustained when she fell on the sidewalk adjacent to 817 9th Avenue, New York, NY. The incident occurred adjacent to a store occupied by defendant 9th Avenue Royal Deli (Royal Deli), in a building owned by defendants Bongju Shim and Ann Hwa Shim (Mr. and Mrs. Shim), on a portion of which defendant Titan 360 Inc. (Titan 360), had installed public telephones as permanent fixtures. Ruben Serra, Sr, plaintiff's husband, brings a derivative action for loss of consortium. Plaintiff is in opposition to the herein motion. Discovery in this matter is complete and the Note of Issue has been filed.

Royal Deli moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, and Mr. and Mrs. Shim and Titan each cross-move for summary judgment. All of the motions for summary judgment are based on, *inter alia*, the grounds that plaintiff cannot clearly identify the cause of her fall, and thus has failed to set forth a prima facie case. The gravamen

of the argument for failure to identify a cause of the fall are plaintiff's numerous ambiguous replies at two depositions to questioning about what caused her to fall, the transcripts of which are annexed as exhibits to Royal Deli's moving papers. Amongst other examples, Royal Deli singles out her inability to remember where she was coming from at the time of the fall, her inability to quantify the length, width or shape of the hole in which her heel got caught, her inability to say how much of her heel got caught, her failure to identify the location of the hole on a photograph of the sidewalk, and subsequent inconsistent statements as to what caused her fall and the location of the defect on a photograph of the sidewalk.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light

most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well established that “a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk” (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). “A defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (*id.* at 500; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defense to discover and remedy it (see *Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). “Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Smith*, 50 AD3d at 500). It is well settled, however, that “rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact” (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

DISCUSSION

The Court finds merit in the plaintiff’s argument that, despite the focus by defendants on plaintiff’s ambiguities and inconsistencies, it is clear, from a focus that takes in the larger picture, that she knows her accident was caused by cracks and/or holes in the sidewalk at the location alleged.

The extent to which plaintiff's ambiguities and inconsistencies may reflect on her credibility and reliability as a witness is within the province of the jury to determine. "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact" (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] [internal citations omitted]; see also *Castillo v New York City Tr. Auth.*, 69 AD3d 487 [1st Dept 2010] [holding that issues of credibility are to be resolved at trial and not by motions for summary judgment]). Accordingly, the portions of the defendants' motion and cross-motions seeking dismissal of the complaint on the ground that plaintiff cannot identify the cause of her fall is denied.

The portion of Royal Deli's motion for summary judgment dismissing the complaint on the ground that as a tenant it owed no duty to plaintiff to maintain the sidewalk on which she fell fails to establish the absence of a triable issue of fact on this question. Royal Deli's attorney, David Drossman, concedes in his supporting affirmation, dated February 6, 2013, that the terms of the lease between Royal Deli and the landlords, Mr. and Mrs. Shim, obligate Royal Deli to keep the sidewalk in good repair. However, Royal Deli claims that it was not on notice of any defect, and thus must escape liability.

Even if the lease were silent on the subject, such duty as Royal Deli may have owed to the plaintiff is also a question of fact for the jury. It was held in *Abramson v Eden Farm Inc.*, (70 AD3d 514 [1st Dept 2010]), wherein the store tenant's lease contained provisions similar to the tenant's lease herein, those terms raised the question of whether the repair provisions were so comprehensive as to "displace" the landowner's statutory duty (*id.*). In *Sampino v Crescent Associates, LLC.* (34 AD3d 779, 782 [2d Dept 2006]), the court found a triable issue of fact regarding whether the landlord retained sufficient control over the sidewalk abutting the tenant's space, such that, in the absence of sufficient control, the tenant would bear the liability for repair and maintenance. Furthermore, "[a] tenant has a common-law duty to remove

dangerous or defective conditions from the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair” (*Sarisohn v 341 Commack Rd. Inc.*, 89 AD3d 1007, 1009 [2d Dept 2011]).

Accordingly, the portion of Royal Deli's motion for summary judgment dismissing the complaint on the ground that it had no duty to the plaintiff to maintain safe premises is denied, and the portion of the said motion seeking dismissal of cross-claims against Royal Deli from Mr. and Mrs. Shim, and Titan 360 are similarly denied.

The portion of the cross-motion by Mr. and Mrs. Shim for summary judgment dismissing the complaint on the ground that they owed no duty to the plaintiff, and that branch of the said cross-motion for summary judgment dismissing cross claims against Mr. and Mrs. Shim by Royal Deli and Titan 360 are similarly denied, as Mr. and Mrs. Shim have not established conclusively that there is no triable issue of fact as to whether or not they had a duty to plaintiff, as an owner “has a statutory, nondelegable duty to maintain the sidewalk abutting its premises “ pursuant to section 7-210 of the Admin. Code (*Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]).

Further, the portion of the cross-motion by Titan 360 for dismissal of the complaint on the grounds that Titan owned no duty to the plaintiff is denied. That branch of the said motion for dismissal of all cross-claims against Titan 360 by Royal Deli and Mr. and Mrs. Shim are also denied as Titan 360 has not established its entitlement to this relief arising from evidence demonstrating a lack of a triable issue of fact as to Titan 360's duty to the plaintiff.

CONCLUSION

Accordingly, it is

ORDERED, that the motion by defendant 9th Avenue Royal Deli for (1) dismissal of the complaint and (2) the cross-claims against said 9th Avenue Royal Deli is denied in all respects, and it is further,

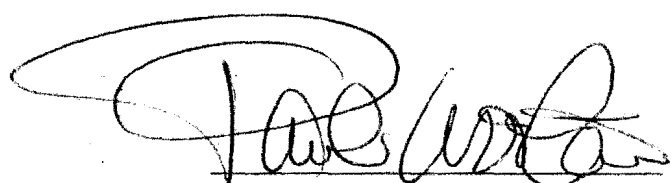
ORDERED, that the motion by defendants Bongju Shim and Ann Hwa Shim to dismiss (1) the complaint (2) and cross-claims against them is denied in all respects, and it is further

ORDERED, that the motion by defendant Titan 360 for (1) dismissal of the complaint and (2) for dismissal of the counterclaims against Titan 360 is denied in all respects; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the decision and order of the court.

Dated: 11-26-13


PAUL WOOTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

FILED
NOV 29 2013
COUNTY CLERK'S OFFICE
NEW YORK