Martinez v Nicaj
2014 NY Slip Op 31051(U)
April 21, 2014
Supreme Court, New York County
Docket Number: 402143/2011
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LOUIS A. MARTINEZ,

Plaintiff,

-against-

NIKOLLA NICAJ, GJOKA NICAJ, 304 EAST 116TH STREET REALTY CORP., EAGLE TILE & HOME CENTER, INC.,

Defendants.

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Index No. 402143/2011

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendant Eagle Tile & Home Center, Inc. ("Eagle") moves for summary judgment dismissing the complaint of the plaintiff Louis A. Martinez ("plaintiff") and all cross-claims by co-defendants asserted against it.

Factual Background

Plaintiff claims that on December 5, 2009, he tripped and fell over cellar doors while walking on a sidewalk in front of the premises located at 2254 2nd Avenue, New York, New York. The premises was owned by defendants Nikolla Nicaj ("Nikolla") and Gjoka Nicaj ("Gjoka") (collectively, the "landlords") and the store and basement portions were leased to Eagle, a tile store, pursuant to a lease (the "Lease").

Plaintiff testified at his deposition that as he was walking over the cellar doors, "the left side of the door went down, and I hit my foot the right" door, and he "fell sideways" to the ground (EBT, pp. 16, 18). He explained that when he stepped on the cellar door "It gave way" and he "felt" it become depressed (EBT, p. 59). Before he fell, he looked at the cellar doors and did not notice any space between the two cellar doors (EBT, p. 61).

Plaintiff lived in the area for 30 years and traversed the subject sidewalk "Hundreds" of times (EBT, pp. 11, 63). He "probably" walked across the cellar doors before, and did not have any difficulty waking across the cellar doors (EBT, p. 63). When asked if the cellar doors ever gave way when he walked on them on prior occasions, plaintiff replied, "No, sir." (EBT, p. 76). He did not make any complaints regarding the cellar doors prior to his accident and was unaware of any prior similar accidents involving the cellar doors, or of whether the cellar doors ever gave way with anyone else walking upon them (EBT, pp. 64, 65, 76-77). On prior occasions, the cellar doors had a lock on them (EBT, p. 78). However, on the date of the accident, the lock was missing (EBT, pp. 77, 80).

Gjoka testified that he and his brother Nikolla own the building and the store, Eagle, (EBT, Exhibit K, pp. 8-9). As the landlord, he is responsible for maintenance and repair of the building, whereas Eagle is responsible for snow removal and cleaning the sidewalk (EBT, pp. 33-34). Eagle kept tiles and materials in the basement, and a "lift" was used inside the store to transport heavy materials to the basement (EBT, p. 31). The cellar doors are locked with a padlock (EBT, p. 22), and "never" left unlocked (EBT, pp. 22, 23). They are opened and used with a conveyor belt for deliveries (EBT, pp. 31-32). After the completion of deliveries, the cellar doors are locked with the padlock (EBT, pp. 23-24). He and his brother never saw the cellar doors uneven in the closed position (EBT, p. 30), and he never received complaints regarding the condition of the cellar doors (EBT, pp, 23, 24, 30, 32, 33). He never had to reprimand his employees for leaving the cellar doors unlocked (EBT, p. 24), and he never complained to anyone regarding the condition of the cellar doors (EBT, p. 33) and never noticed any defective condition of the cellar doors, or whether, either locked or unlocked, one door sinks

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if you stepped on it (EBT, p. 25).

In support of summary judgment, Eagle argues the Lease demonstrates that the owners, and not Eagle, had a duty to maintain and repair the cellar doors. Eagle was only responsible for cleaning and removing snow from the sidewalk, which is not relevant to this matter. Eagle points to the portion of the Lease entitled "Repairs," which requires the "Owner," Nikolla and Gjoka, to "maintain and repair the public portions of the building . . ." and the portion of the Lease entitled "Vault, Vault Space Area" which exempts the vault area from the leased premises, and only gives Eagle a license to use the vault. Nor is Eagle responsible for structural repairs under the Lease.

Even assuming Eagle owed plaintiff a duty regarding the cellar doors, no ordinance or statute requires cellar doors to be locked, and there is nothing inherently dangerous about unlocked cellar doors. Additionally, Eagle did not cause or create the condition of the cellar doors or repair them. There is no indication that Eagle left the cellar doors unlocked, or that Eagle unlocked the cellar doors immediately prior to the accident. Thus, Eagle was under no duty to plaintiff to remedy the cellar doors. Nor is there any evidence that Eagle had actual or constructive notice of a defective condition.

Further, the condition that allegedly caused plaintiff to fall was trivial, and therefore, not actionable as a matter of law. There is no evidence that the cellar doors were more than slightly depressed, and there is no testimony of any height differential. And in light of the close of discovery, no expert affidavit may be submitted to defeat summary judgment, especially since the parties' on-site inspection of the location was outside the presence of any expert.

Nikolla, Gjoka, and 304 East 116th Realty Corp.[1] ("co-defendants") support the dismissal of plaintiff's complaint based on the lack of notice to defendants and that the injury was caused by a trivial defect. However, co-defendants oppose Eagle's claims for judgment against them inasmuch as plaintiff's claimed defect existed within an area of the leased premises used by Eagle, and that the landlords were not given notice of the alleged defective condition.[2]

Plaintiff opposes the motion, arguing that issues of fact exist as to whether Eagle created the condition by removing the lock which apparently helped to further steady the doors and contributed to the doors becoming unlevel when plaintiff stepped on them.

Also, issues of fact exist as to whether Eagle was on constructive notice of the defective condition of the vault door. Further, the type of defect at issue is not a transitory condition which defendants would have had no opportunity to discover. The photographs show that the vault doors were present for years and Eagle has the obligation to make reasonable inspections of its property. This was not the first time that the doors dropped down when someone stepped on them, and defendants either knew or should of known of this condition.

And the Lease is unclear as to which defendant retained the obligation to maintain the vault door. The Lease states that the owner maintains the public portions and that the tenant was obligated to make all repairs and replacements to the sidewalks and curbs. And, the type of vault doors at issue were part of a hoist and/or lift used to bring materials up from the basement which paragraph 4 of the Lease obligates the tenant to maintain. Thus, Eagle cannot establish that the

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[1] Gjoka testified that he and his brother are principals of 304 East 116th Street Realty Corp., which manages another building and has no relation to the property at issue except that the mailing address for 304 East 116th Street Realty Corp. is the subject building (EBT, pp. 10-12, 26-27).

[2] It is noted that Eagle's motion seeks dismissal of claims against it, and does not seek affirmative relief on its claims against co-defendants.

landlords are responsible to maintain the vault doors.

Further, the defect was not trivial, and constituted a tripping hazard. Defendants presented no evidence to contradict that the vault door became depressed when plaintiff stepped on it, and that the height differential caught plaintiff's foot and caused him to fall.

In reply, Eagle adds that a slightly elevated door readily observable in daylight and located in a regularly traversed area is trivial, and does not constitute a trap or a nuisance. Plaintiff was unable to quantify the number of inches of the alleged depression. And, no expert was retained to inspect or measure the depression.

Further, the Lease requires the Tenant to maintain exterior installations only if Tenant erects same, and there is no evidence that Tenant erected any exterior hoist, lift, or sidewalk elevator. The stairs and lift testified to by Gjoka are located and accessed inside the premises. Thus, the owners had the contractual duty to maintain and repair the vault doors.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501

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NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A defendant who moves for summary judgment in a trip-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" (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 962 NYS2d 46 [1st Dept 2013]; *Pfeuffer v New York City Housing Auth.*, 93 AD3d 470, 940 NYS2d 566 [1st Dept 2012]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 927 NYS2d 49 [1st Dept 2011]). 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" (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, *supra, citing Rodriguez v 705-7 E. 179th St. Hous. Dev Fund Corp.*, 79 AD3d 518, 913 NYS2d 189 [1st Dept 2010], *citing Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [2008]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi*, 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492,

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954 NYS2d 53 [1st Dept 2012]).

Here, Eagle demonstrated that the Lease clearly obligates the co-defendants, as owners, to maintain and repair the subject vault doors. "A lease, like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties" *(112 West 34th Street Associates, LLC v 112-1400 Trade Properties LLC*, 95 AD3d 529, 944 NYS2d 68 [1st Dept 2012] *citing Farrell Lines v City of New York*, 30 NY2d 76, 82, 330 NYS2d 358, 281 NE2d 162 [1972]). "Courts are obliged to interpret a [lease] so as to give meaning to all of its terms" (*112 West 34th Street Associates, LLC, supra citing 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 A.D.3d 1, 5, 784 N.Y.S.2d 63 [2004] [internal quotation marks omitted]). Further, "[i]t is well settled that no additional liability or requirement will be imposed upon a tenant by interpretation unless it is clearly within the provisions of the instrument under which it is claimed" (*112 West 34th Street Associates, LLC, supra citing 67 Wall St. Co. v Franklin Nat. Bank*, 37 NY2d 245, 249, 371 NYS2d 915, 333 NE2d 184 [1975]).

The Lease provides, in section 14, that

> No vault, vault space or area whether or not enclosed or covered not within the property line of the building is leased hereunder . . . Owner makes no representation as to the location of the property line of the building . . . . All vaults and vault space and all such area; not within the property line of the building which Tenant may be permitted to use and/or occupy is to be used and/or occupied under a revocable license. . . .

This section clearly exempts from the leased premises the vault and vault space, and grants Eagle a revocable license to use same. Plaintiff failed to raise an issue of fact as to the applicability and enforcability of this provision.

Further, the portion of the Lease entitled "Repairs," provides:

"Owner shall maintain and repair the public Portions of the building except that if Owner

Allows Tenant to erect on the outside of the building a sign or signs or a hoist, lift or sidewalk elevator for the exclusive use of Tenant, Tenant shall maintain such exterior installation in good appearance and shall cause the same to be operated in a good and workmanlike manner and shall make all repairs thereto necessary . . . ."

This section unambiguously demonstrates that the Tenant, Eagle, was solely obligated to maintain exterior installations of sign or signs or a hoist, lift or sidewalk elevators, which do not apply to the lift cited by plaintiff. According to Gjoka, the "lift" was located *inside* the store, and was used to bring materials from the basement to the inside of the store (EBT, p. 31).

Therefore, contrary to plaintiff's contention, Eagle bore no responsibility under the Lease to repair or maintain the vault doors. And, consistent with the Lease, Gjoka testified that the Tenant (Eagle) was responsible for cleaning the sidewalk, and "Other than cleaning the sidewalk for maintenance, the landlord. I am the landlord responsible for [sic]" (EBT p. 34).

In any event, plaintiff's negligence theory predicated upon an alleged unknown height differential between the two vault doors, must be dismissed in that there is no indication that such condition constituted a trap or hazard, and as such, was a trivial, nonactionable defect as a matter of law (*see Boynton v Haru Sake Bar*, 107 A.D.3d 445, 968 N.Y.S.2d 430 [1st Dept 2013] (one-inch height differential between the level of the sidewalk and the frame to the cellar hatch doors is trivial, and an insufficient basis for finding liability on the part of defendant) *citing Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488, 935 NYS2d 10 [1st Dept 2011]). Based on a liberal reading of the submissions, the sole testimony regarding the condition of the vault doors was plaintiff's deposition testimony indicating that the vault doors "came in a little" (EBT, p. 15). No other description of the vault doors was provided. Nor has plaintiff provided an affidavit in opposition to the motion to supplement the description of the alleged defect, or to

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show that this trivial defect could have been "a trap or snare by reason of its location, adverse weather or lighting conditions or other circumstances (*Hutchinson v Sheridan Hill House Corp.*, 110 AD3d 552, 973 NYS2d 178 [1st Dept 2013] *citing Burko v Friedland*, 62 AD2d 462, 878 NYS2d 64). The record indicates that plaintiff's accident occurred during the daylight hours, in an area he frequented, and that there was no snow or ice on the ground (*Riley v City of New York*, 50 AD3d 344, 854 NYS2d 400 [1st Dept 2008] (action dismissed where top edge of a cellar door that was *slightly elevated* above the sidewalk, and plaintiff's deposition testimony established that the accident occurred in *daylight in an area that he traveled on a daily basis*) (emphasis added)).

The case cited by plaintiff is factually distinguishable, as there is no evidence, in the form of plaintiff's deposition testimony or by affidavit from plaintiff describing, with any detail, the purported defect that caused him to trip and fall (*Fazio v Costco Wholesale Corp.*, 85 AD3d 443, 924 NYS2d 381 [1st Dept 2011] ("concrete in the depressed area was eroded, broken up and uneven, with exposed, protruding stone creates an issue of fact whether the defect was trivial")).

Thus, inasmuch as plaintiff failed to present any evidence sufficient to raise a triable issue as to whether the alleged vault doors possessed the characteristics of a trap or snare or was otherwise actionable, there is no issue of fact as to whether plaintiff tripped and fell over a trivial, non actionable defect (*Thomas v City of New York*, 301 A.D.2d 387, 753 N.Y.S.2d 468 [1st Dept 2003]).

Furthermore, even assuming plaintiff tripped and fell over an actionable defect, Eagle made a *prima facie* showing of the absence of prior actual notice of the alleged dangerous condition. Although the record indicates that Eagle utilized the vault doors "rarely" to transport

and deliver materials from outside the building to the basement (Gjoka EBT, pp. 22-24 ("Could be days" that the vault doors are opened), the accident was allegedly caused by a *height differential* existing between the two vault doors, either due to the weight placed upon the vault doors, or by the weight placed upon the vault doors coupled with the absence of a lock which was typically used by Eagle on the doors. Eagle's owner Gjoka, who had personal knowledge of day to day operations and repair and maintenance obligations of the store, testified that he never observed the alleged height differential of the vault doors, and never received any complaints about such condition up to the date of the accident (EBT, pp. 12, 23). Plaintiff also testified that he was unaware of any prior complaints made to Eagle concerning such condition.

Eagle also established the absence of any constructive notice of a dangerous condition existing on the vault doors. To constitute constructive notice of a dangerous condition, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept 2000]; *Guttierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]). A mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

There is no indication that Eagle (*via* its employees or owners) walked on or placed any

weight upon the vault doors for any period of time prior to the date of the accident so as to give rise to notice of the existence of a height differential created under such circumstances. Plaintiff also testified that he traversed the area numerous times, and "probably" on the vault doors, and never observed the dangerous condition alleged. And, even assuming that the lock typically used on the vault doors was missing on the date of the incident, there is no indication that the lock had been missing for any period of time, or that Eagle had any prior notice that the absence of a lock on the vault door created the alleged tripping hazard.

That the vault doors themselves existed for a period of time is insufficient, as the law requires notice of the specific condition alleged (*Piacquadio v Recine Realty Corp.*, 84 N.Y.2d 967 [1994]).

Plaintiff failed to raise an issue of fact sufficient to overcome Eagle's showing that there was no prior actual or constructive notice of such height differential.

Nor is there any indication that Eagle removed any lock on the day of the alleged accident. Gjoka testified that there was never an occasion that the vault doors were left unlocked (EBT, p. 23) and there is no indication that deliveries were made on the date of plaintiff's accident.

Finally, as there is no opposition to the branch of Eagle's motion for dismissal of the cross-claims by co-defendants, said cross-claims are also dismissed.

Conclusion

Based on the foregoing, it is hereby

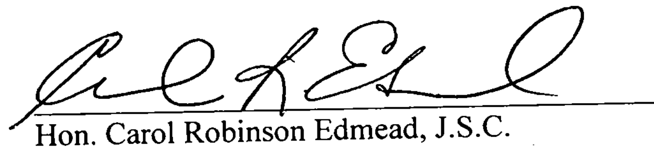
ORDERED that the motion by defendant Eagle Tile & Home Center, Inc. for summary judgment dismissing the complaint of the plaintiff Louis A. Martinez and all cross-claims by co-

defendants asserted against it is granted, and the action is severed and dismissed as against defendant Eagle Tile & Home Center, Inc.; and it is further

ORDERED that said defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 21, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD