Pineda v 1741 Hone Realty Corp.
2014 NY Slip Op 32635(U)
September 22, 2014
Supreme Court, Bronx County
Docket Number: 301512/2009
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

FRANCISCO PINEDA,

Plaintiff,

-against-

1741 HONE REALTY CORP.,

Defendant(s).

Index No. 301512/2009
DECISION AND ORDER

HON. SHARON A.M. AARONS. J.S.C.:

Defendant 1741 HONE REALTY CORP.(HONE REALTY) moves to dismiss the complaint pursuant to CPLR 3212. Plaintiff submits written opposition. The motion is denied.

Plaintiff was allegedly injured on August 14, 2008, at approximately 6:00 PM, while delivering packages at a multiple dwelling owned by defendant Hone Realty, and located at 1741 Hone Avenue in Bronx County. At the time of the alleged accident, plaintiff was employed by Robert Bou, who was delivering Federal Express packages.[1] The building housed four stores and a residential apartment on the first floor, and four residential apartments on the second floor.

From the exterior, access to the premises is made through a glass entry door framed by two fixed, glass panels. Once inside, there is a small vestibule. On the other side of the vestibule there is an interior door with a fixed glass panel to the right. Once a person passes through this interior glass door, there is a stairway which leads to the second floor on the right. The marble-treaded

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[1]Defendant Hone Realty had commenced a third party action against Robert Bou and Federal Express. The action against Mr. Bou was discontinued by stipulation. The action against Federal Express was dismissed (Aarons, J., Dec. 11, 2012) on Federal Express's motion for summary judgment, based on the absence of any evidence that plaintiff or Bou were employees of Federal Express.

stairway leading from the first floor to the second floor is positioned directly in front of the fixed glass panel. Plaintiff alleges that he ascended the stairway, delivered a package, and that as he descended the same staircase, he slipped on a wet substance on the third tread from the bottom of the stairway, falling directly forward into the fixed glass panel, which shattered, causing severe injuries.

In support of the motion, defendant submits the pleadings for the main action and the third party action; the stipulation of discontinuance against third-party defendant Roberto Bou; the prior decision of the court granting third-party defendant Federal Express' motion for summary judgment dismissing all claims against it; the Bill of Particulars and Supplemental Bill of Particulars; plaintiff Pineda's unsigned, certified deposition transcript[2]; third-party defendant Roberto Bou's certified, signed deposition transcript; the unsigned, certified deposition transcript for defendant 1741 Hone Realty Corp. by Gian Spadafora; non-party witness Joseph Porco's certified, signed deposition transcript; the affidavit of Scott Cameron, a registered architect and a senior forensic architect with LGI Forensic Engineering; twelve photographs; and an affidavit in support by Joseph Porco.

Plaintiff's deposition testimony indicates that a rain storm had ended approximately twenty (20) minutes before the accident. As he ascended the stairway, he noticed that all of the stair treads were "a little wet." As he descended the same stairway, although holding onto the bannister, he

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[2]No party has challenged the accuracy of any of the transcripts, nor challenged the failure to submit the certification of any of the depositions. Under these circumstances, failure to sign the transcript or failure to submit a certification is an irregularity which is deemed waived by the parties. *See Rosenblatt v. St. George Health & Racquetball Assoc.*, LLC, 984 N.Y.S.2d 401, 2014 N.Y. App. Div. LEXIS 2854 (2d Dept. 2014) (failure to submit to the Supreme Court a certified copy of the plaintiff's deposition was an irregularity and, as no substantial right of a party was prejudiced, the court should have ignored the defect); *Gomez v. Shop-Rite of New Greenway*, 110 A.D.3d 483, 973 N.Y.S.2d 65, 2013 N.Y. App. Div. LEXIS 6489 (1st Dept. 2013) (appropriate to rely on unsigned, certified deposition transcript where transcript was not challenged as inaccurate).

slipped on the third step from the bottom, fell forward, stumbled, and crashed into the glass panel. Defendants submissions further establish that Mr. Bou did not observe any condition on the steps prior to or after the accident. Further, defendant's submission established that defendant Hone Realty is a closely-owned corporation run by various family members related to the shareholders. Gian Spadafora testified that he managed the building, and supervised the cleaning of the premises, together with his uncle, Joseph Porco. Gian Spadafora testified that he "assumed" that the glass panel was composed of "shatterproof glass," because, "That's what [is] installed in a commercial building, can't have anything but."[3] His father, Bruno Spadafora testified that he had no idea what type of glass was beside the entry door, and that the glass panel had been unchanged since 1984 when his wife "took over the building." Joseph Porco testified that one glass plane had been replaced in th exterior glass panels adjacent to the sidewalk before the accident, but not the pane which allegedly caused injury to the plaintiff. He alleged in his affidavit that he inspected the premises at approximately 10:00 AM on the morning of the accident, and did not observe any condition on the steps.

The affidavit of defendants expert Scott Cameron opined that the building was constructed in 1963, and that no building code or regulation required that the glass panel be composed of safety/laminated or tempered glass.[4] The building codes promulgated subsequent to the building's construction did not require that existing glazing be replaced with safety/laminated or tempered glass. The expert also conducted an "anti-slip meter test" on the marble stair treads and lobby ceramic tile floor with an Xcel CLT Tribometer, and found that they were safe, either when dry or

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[3]Despite this testimony, it is not contested on this motion that the glass panel was composed of clear plate glass, and not safety glass.

[4]The defendant does not dispute that the glass was not safety glass.

wet.

Based on the foregoing evidence, the defendant argues that it did not create the condition on the steps, or have any notice of it, as there is no evidence as to how the long the wet condition was present. In addition, the defendant argues that it was not in violation of any building code or other regulation with respect to the fixed glass pane, and that the stair treads were not dangerous.

In opposition, plaintiff submitted the affidavit of Elise Dann, R.A., a registered architect. He stated that the glass panel, which measured 41 inches wide by 79 inches in height, was unprotected, non-safety glass panel which was inherently dangerous in the location in which it was installed. Mr. Dann stated that even in 1963, when the building was constructed, the National Safety Council recommended protective grilles on windows within three feet of stairway landings. Moreover, safety standards as early as 1942 recognized the danger of unprotected non-safety glass in occupied spaces. Thus, even if the glass was original and had not been replaced (and thus was not in violation of any code), it constituted an unreasonably dangerous condition. Plaintiff argues that the defendant was negligent in allowing a foreign substance to be present on the floor, in failing to protect the glass pane with bars or grilles, and in failing to install safety tempered or shatterproof glass.

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994]. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v. American Museum of Natural History,*

67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

"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" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]). "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." *(Mei Xiao Guo v. Quong Big Realty Corp.*, 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 [2d Dept. 2011] [citations omitted].) Here, the defendant's evidence is that the stairway was inspected some eight hours before the accident, which is not sufficient to establish lack of construction notice. (*Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284, 649 NYS2d 11 [1st Dept. 1996] [issue of fact as to whether existence of condition on steps for 90 minutes constituted constructive notice].)[5]

In addition, issues of fact exist as to common law negligence. An owner's alleged compliance with the applicable statutes and regulations is not dispositive of the question whether it satisfied its duties under the common law. (*Flores v. Nikac*, 2014 N.Y. Misc. LEXIS 938, 2014

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[5] The plaintiff stated that it had been raining, and that the rain ended twenty minutes previously. There is no clear evidence, however, that the wet condition on the steps was caused by tracked-in rain. Assuming that it was, there is no evidence that the defendant took any precautions whatsoever to address tracked-in moisture. In *Amsel v. New York Convention Ctr. Operating Corp.* (60 A.D.3d 534, 875 N.Y.S.2d 476 [1st Dept. 2009]), the Court held, "Defendant established prima facie its entitlement to summary judgment by demonstrating that it had rained earlier in the day and was raining at the time of plaintiff's accident and that defendant had taken reasonable precautions to prevent the tracked-in water from accumulating by placing mats on the lobby floor and mopping the floor throughout the day and had neither actual nor constructive notice of the particular wet condition that allegedly caused the accident (*see* Garcia v Delgado Travel Agency, 4 AD3d 204, 771 NYS2d 646 [2004])." Here, there is no evidence that maps were placed down for tracked-in rain, or that the stairs were mopped at any time.

NY Slip Op 30537(U) [Sup. Ct., Bronx Co. 2014].) In *Trimarco v. Klein* (56 N.Y.2d 98, 436 N.E.2d 502 [1982]), plaintiff-tenant was injured when the glass enclosure of the bathtub in a multiple dwelling shattered. The enclosure, as the glass panel at issue here, was made out of ordinary glass. At the time of the accident in 1976, safety glazing material as mandated by General Business Law § 389-m, effective July 1, 1973, was required in bathroom enclosures; however, safety glazing material was not required by the statute in the plaintiff's apartment, as the installation pre-dated the statute. At trial, the plaintiff produced evidence of a custom and practice pre-dating the statute on the part of building owners to employ shatterproof glass. The Court of Appeals held that the trial evidence, including plaintiff's expert testimony and evidence of the use of shatterproof glass by the local building industry for "the better part of two decades" (*id* at 107), was sufficient to raise a triable issue as to whether the shower enclosure was reasonably safe.[6]

It has been stated that, "Liability may be based on an alleged defect in the glass of the door, but only if the defendant has notice of the defect, and the injury was foreseeable." (Warren's Negligence in the New York Courts § 198.02[3].) However, despite the holding in *Trimarco*, common law negligence claims based on the failure to install safety glazing have not favored plaintiffs. In numerous cases, courts have dismissed claims based on common law negligence, including the following:

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[6] The glass panel at issue here would appear to one which would be required to be made of safety glass if the panel had been installed after the enactment of the General Business Law. General Business Law § 389-o states that, "It shall be unlawful within the state of New York to knowingly sell, fabricate, assemble, glaze, install, consent or cause to be installed glazing materials other than safety glazing materials in or for use in, any 'hazardous locations.' " "Hazardous locations" include "fixed glazed panels immediately adjacent to entrance and exit doors which may be mistaken for doors...." General Business Law § 389-m (2). "Fixed glass panels" are further defined as "the first fixed glazed panel on either or both sides of the doors, forty-eight inches or less in width, within six feet horizontally of the nearest vertical edge of the door." General Business Law § 389-m (3).

- *Dwyer v. Diocese of Rockville Ctr.*, 45 A.D.3d 527, 845 N.Y.S.2d 126, 127 (2d Dept 2007) (plaintiff injured when his hand struck pane of glass in school gymnasium door, and pane shattered; plaintiff alleged that defendant was negligent in failing to install "safety glass;" defendant entitled to judgment as matter of law by submitting evidence that door fully complied with all applicable building codes that were in effect at time school was built. The evidence submitted by the plaintiffs in opposition to the motion, including the affidavit of their engineering expert, was insufficient to raise a triable issue of fact).
- *Sepulveda v. Reynolds*, 288 A.D.2d 368, 369, 733 N.Y.S.2d 637 (2d Dept. 2001) (plaintiff's hand broke through glass in interior door of rented house; plaintiffs failed to raise issue of fact whether defendants violated cited regulations or contravened alleged industry standards concerning safety glazing by failing to replace glass in with glass with safety glazing).
- *Blackburn v. McLaughlin*, 289 A.D.2d 840, 734 N.Y.S.2d 713 (3d Dept. 2001) (the Court, distinguishing *Trimarco*, held that landlord was not liable for accident involving shower door not constructed of safety glass; landlord was not aware, prior to accident, that door was not constructed of safety glass, and no proof was adduced that defendant was aware of any custom in rental business to replace nonsafety glass shower doors with safety glass);
- *Thompson v. St. Christopher-Ottilie*, 31 A.D.3d 534, 817 N.Y.S.2d 519 (2d Dept. 2006), *appeal denied*, 8 N.Y.3d 803, 830 N.Y.S.2d 699, 862 N.E.2d 791 (2007) (plaintiff, who was injured when she put her hand through a glass pane in a door, failed to make a prima facie showing that the defendant was negligent for failing to use safety glass in the door);
- *Mele v. Golian Realty Co.*, 7 A.D.3d 683, 776 N.Y.S.2d 844 (2d Dept. 2004) (infant plaintiff allegedly sustained hand injuries when glass panel shattered in attempting to push open the interior entrance door of an apartment building; plaintiffs failed to submit evidence sufficient

to raise a triable issue of fact as to whether the defendants contravened industry standard and custom by failing to use safety glass in the door or whether the defendants had prior notice of the alleged dangerous condition of the glass in the door).

- *Aufiero v. Tramontano*, 164 Misc. 2d 166, 623 N.Y.S.2d 992 (Sup. Ct., Kings Co. 1995) (court granted the defendant homeowners' motion for summary judgment dismissing the complaint where the plaintiff tripped over defendant's dog and fell into a glass storm door, which was made of ordinary glass; installation of the door pre-dated General Business Law § 389-o; no evidence that the defendant-homeowners, who purchased the home in 1971, knew that the door was not made of safety glass).

Certain factors, however, distinguish this case from the foregoing cases. Here, plaintiff has adduced expert testimony of established safety standards which would warrant replacement of the gall panel, or erecting a protective barrier to prevent a fall into the panel. "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants." (*Murphy v. Conner*, 84 N.Y.2d 969, 646 N.E.2d 796, 622 N.Y.S.2d 494 [1994] [plaintiff's expert's affidavit was conclusory, and did not demonstrate that the manufacture and installation of inherently smooth floor tiling deviated from accepted industry practice].) Moreover, Gian Spadafora testified that "in a commercial building, [you] can't have anything but" safety glass, indicating an awareness that accepted industry standards required the use of safety glazing. His awareness that safety glass is generally required raises issues of fact as to whether the failure to install safety glass was negligent. To the extent that he stated that he "assumed" the existing glass was safety glass, the defendant has not submitted any evidence that his belief was reasonable, or that the appearance of safety glass in

indistinguishable from ordinary glass. Moreover, the location of the fixed glass pane within several feet of the end of a staircase raises issues of fact as to whether the non-safety glass should have been replaced or protected by a railing or other protective device.

In any event, even if this Court were to hold that the failure to replace the glass panel or erect barriers was not negligent, the failure of defendant to establish lack of constructive notice of the wet condition on the steps would still require denial of the present motion.

Accordingly, the motion is denied.

This constitutes the Decision and Order of the Court.

Dated: September 22, 2014

SHARON A.M. AARONS. J.S.C.