Crane v 315 Greenwich St., LLC
2014 NY Slip Op 33660(U)
September 3, 2014
Supreme Court, New York County
Docket Number: 113102/10
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA 9/3/14 E

PRESENT: GEORGE J. SILVER PART 10
Justice

Index Number : 113102/2010
CRANE, ELAINE F.
vs.
SALAAM BOMBAY
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

RECEIVED
SEP 03 2014
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NYS SUPREME COURT - CIVIL

FILED
SEP 04 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: SEP 03 2014

George J. Silver
J.S.C.
GEORGE J. SILVER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------X

ELAINE CRANE and STEPHEN G. CRANE,

Plaintiffs,

-against-

315 GREENWICH STREET, LLC and SALAAM BOMBAY, INC.,

Defendants.

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113102/10

Index No. 153193/12

DECISION/ORDER

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause, Affirmation, Affidavits & Exhibits Annexed	1
Notice of Cross-Motion Affirmation, Affidavits & Exhibits Annexed	2, 3
Affirmation In Opposition to Motion and Cross-Motion, Affidavit & Exhibits Annexed	4
Affirmation in Further Support of Motion and in Partial Opposition to Cross-Motion	5
Replying Affirmations & Exhibits Annexed	6, 7

In this consolidated action to recover for personal injuries allegedly sustained in a trip and fall defendant 315 Greenwich Street, LLC (315 Greenwich) moves by notice of motion dated February 20, 2014 for order granting it summary judgment and dismissing the complaint of plaintiffs Elaine Crane (Crane) and her husband, Stephen G. Crane, who asserts a derivative action for loss of services. Defendant Salaam Bombay, Inc. (Salaam) cross-moves for summary judgment dismissing plaintiffs' complaint. Plaintiffs oppose the motion and cross-motion[1]. Salaam also opposes 315 Greenwich's motion.

Crane testified at her deposition that her accident July 17, 2010 near the corner of Greenwich Street and Reade Street. Crane and walking with her husband and grandson to playground. Crane was holding hr grandson's hand with her left hand. Crane's husband was

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[1] Plaintiffs waived their objection to the timeliness of the motion and cross-motion during oral argument on May 20, 2014.

holding their grandson's other hand. As she was walking one of plaintiff's feet cam into contact with the wheel of a bicycle which was chained to a scaffold. According to plaintiff, the bicycle the wheel over which she tripped was perpendicular to the bicycle itself. Plaintiff testified that she did not see the bicycle before she fell. Plaintiff did not recall the color or brand of the bicycle that she tripped over but believed it to be a single person bicycle. Defendant Salaam is a restaurant located at 319 Greenwich Street and 315 Greenwich is the owner of the property known as 315 Greenwich Street, which is adjacent to the portion of the sidewalk where plaintiff allegedly fell. Plaintiff alleges in her verified complaint that 315 Greenwich allowed bicycles to be negligently parked outside its premises and negligently chained to the scaffold. Plaintiff alleges that Salaam owned the bicycle and allowed the bicycle to be negligently parked outside its premises. Salaam previously moved for summary judgment but failed to establish that it did not own or use the bicycle over which plaintiff allegedly tripped and fell (*Crane v Bombay*, 104 AD3d 575 [1st Dept 2013]).

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, 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, or to tender an acceptableexcuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). 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" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 N.Y.S.2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46

AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

In support of the motion and cross-motion, defendants argue that the bicycle was an open and obvious condition and not inherently dangerous. Establishing that a hazardous condition is open and obvious relives a party charged with maintaining the premises of a duty to warn of the condition (*Tarricone v State of New York*, 175 AD2d 308, 309 [3rd Dept 1991], *lv denied* 78 NY2d 862, 582 NE2d 603, 576 NYS2d 220 [1991]. A condition is open and obvious as a matter of law if it is one that could not be overlooked by any observer reasonably using his or her ordinary senses (*Tagle v Jakob*, 97 NY2d 165, 763 NE2d 107, 737 NYS2d 331 [2001]). Whether a condition is open and obvious is ordinarily a question of fact unless "the established facts compel that conclusion . . . on the basis of clear and undisputed evidence" (*id.*). The fact that a condition is open and obvious does not abate the duty to maintain the premises in a reasonably safe condition (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72-73 [1st Dept 2004]). The duty to maintain premises in a reasonably safe condition is analytically distinct from the duty to warn and liability may be premised on a breach of the duty to maintain reasonably safe conditions even where the obviousness of the risk negates any duty to warn (*Cohen v Shopwell, Inc.*, 309 AD2d 560, 5622 [1st Dept 2003]).

The deposition testimony and, more particularly, the photographs depicting a condition similar to the one encountered by plaintiff on the date of her accident, submitted by defendants in support of the motion and cross-motion establish that the bicycle chained to the scaffold was an open and obvious condition clearly visible to any pedestrian properly utilizing their senses (*Garrido v City of New York*, 9 AD3d 267 [1st Dept 2004]). However, a question of fact is raised as to whether the location of the bicycle's wheel, which plaintiff testified was perpendicular to the body of the bicycle, was an unreasonably dangerous condition warranting amerlioration by 315 Greenwich (*see Lawson v Riverbay Corp.*, 64 AD3d 445 [1st Dept 2009]; NYC Administrative Code 7-210).

On the question of notice, a defendant can be charged with constructive notice of a hazardous condition if it is proven that the condition is one that recurs and about which the defendant has actual notice (*Early v Hilton Hotels Corp.*, 73 AD3d 559 [1st Dept 2010]). If such facts are proven, the defendant can be charged with constructive notice of each condition's recurrence (*id.*). 315 Greenwich's property manager testified that scaffolding was erected outside 315 Greenwich Street in February 2010 and remained up until November 2010. The scaffolding was erected to protect pedestrians while a portion of the facade at 315 Greenwich was repaired. The property manager testified that during the nine months the scaffold was in place he observed varying numbers of bicycles chained to the scaffold. The property manager testified that he did not know who owned the bicycles and never observed anyone actually chaining a bicycle to the scaffold. This testimony is sufficient to raise a triable issue of fact as to whether 315 Greenwich had constructive notice of a recurring condition of bicycles being chained to the scaffold on the sidewalk abutting its property. In light of the foregoing issues of fact, and since the Appellate Division, First Department has already held that questions of facts exist as to whether Salaam Bombay owned the bicycle in question, it is hereby

ORDERED that the motion and cross-motion for summary judgment are denied; and it is

further

ORDERED that movant 315 Greenwich is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry; and it is further

ORDERED that the parties are to appear for a pre-trial conference on October 21, 2014 at 9:30 a.m. in Part 10, room 422, of the courthouse located at 60 Centre Street, New York, New York 10007.

FILED

George J. Silver, J.S.C.

Dated: SEP 03 2014

SEP 04 2014

New York County

COUNTY CLERK'S OFFICE
NEW YORK

GEORGE J. SILVER

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