

Shcherba v 3044 LLC
2015 NY Slip Op 31384(U)
July 27, 2015
Supreme Court, Kings County
Docket Number: 501135/2012
Judge: Mark I. Partnow
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Upon the foregoing papers, defendant and third-party plaintiff, 3044 LLC (hereinafter 3044), moves pursuant to CPLR 3212, for an order granting it summary judgment against plaintiff, Berta Shcherba (hereinafter Shcherba), and dismissing any cross-claims or counter claims asserted by Brighton Enterprises LLC (hereinafter Enterprises) and Brighton Medical Services P.C. (hereinafter Medical Services). Defendants and third-party defendants, Enterprises and Medical Services, move pursuant to CPLR 3212, for an order granting it summary judgment against Shcherba and dismissing any cross-claims and third-party claims asserted against them.

Background

Shcherba commenced the main action by filing a summons and complaint against 3044 on May 14, 2012. On April 24, 2013, 3044 filed a third-party summons and complaint against Enterprises and Medical Services. The foregoing motions concern injuries allegedly suffered by Shcherba as a result of an alleged trip and fall on September 1, 2011, at 3044 Coney Island Avenue in Brooklyn, New York (hereinafter subject property). 3044 is the owner of the subject property, a four-story commercial property, and leases out the first floor and the basement to Enterprises. Enterprises subleases the first floor to Medical Services. Mr. Shpelfogel is the owner of 3044, and Dr. Starosta owns both Medical Services and Enterprises. Shcherba sustained injuries to her foot when she allegedly tripped over a wheelchair lift at the subject property while she was attending a doctor's appointment.

Contentions

3044 contends that summary judgment should be granted in its favor on the issue of liability as there are no triable issues of fact. 3044 argues that the stationary wheelchair lift was not in operation at the time of the accident and was readily observable to anyone entering the building making reasonable use of their senses. 3044 further contends that because the lift was an open and obvious condition, and was not inherently dangerous, it possessed no duty to warn Shcherba of its existence. 3044 avers that the wheelchair lift is open and obvious because it is approximately three to four feet wide and about five to six feet tall. Furthermore, 3044 argues that the lift has been in the same location each and every time Shcherba has visited the building, which it alleges is approximately two to three times a year. 3044 contends that Shcherba did not trip or stumble over the lift, but rather bumped into it with the outside of her right foot as she ascended the stairs. 3044 also notes that Shcherba does not claim that the lighting inside the subject premises prevented her from seeing the lift.

Enterprises and Medical Services contend that Mr. Shpelfogel testified at his deposition that neither company has any ownership interest in the wheelchair lift or is responsible for its maintenance, installation, or inspection. Furthermore, the companies allege that Mr. Shpelfogel testified that the lift was located in the common area of the building and that 3044 had a maintenance contract for the wheelchair lift with the same company that installed it prior to the date of the accident. Additionally, Enterprises and

Medical Services point to the deposition of Ms. Kotler, the office manager, who testified that she contacts Mr. Shpelfogel to deal with any maintenance issues in the common areas of the building.

In opposition to the summary judgment motions, Shcherba contends that the defendants have failed to meet their burden in demonstrating that the condition is open and obvious, that the condition is not inherently dangerous, and that the defendants owed no duty to warn plaintiff of its existence. Shcherba argues that the defendants have failed to establish that the wheelchair lift was undistinguishable from the rest of the stairs. Furthermore, Shcherba contends that the lighting conditions in the lobby and staircase created an optical confusion. Additionally, Shcherba avers that the concrete surface of the step and the sidewalk at the bottom of the step were similar shades of gray, and no contrast in color existed. Shcherba further argues that the condition may be rendered a trap because she was distracted and the condition was obscured.

Shcherba also argues that Enterprises and Medical Services cannot escape liability by claiming that they were only tenants of the building. Shcherba contends that Ms. Kotler's deposition testimony established that a key was required to use, control and operate the wheelchair lift, allowing employees of the companies to exercise control over the lift.

In response, 3044 contends that it is entitled to summary judgment as Shcherba's alleged injuries were sustained as a result of her bumping into a stationary, inactive

wheelchair lift that 3044 argues was open and obvious and not inherently dangerous. 3044 avers that Shcherba, at her deposition, conceded that the lighting in the lobby was quite sufficient. Additionally, 3044 points out that Shcherba does not contend that there were any lighting defects in the hallway of the building, but that it took time for her eyes to adjust to the inside lights from the sunlight outside. Lastly, 3044 contends that Shcherba does not attribute the similarity in color between the sides of the platform of the lift and the floor as a factor that prevented her from perceiving the lift's existence, but only to describe the lift itself.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “[T]he 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 demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118

[1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, “[a]

motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562). If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More

specifically, “averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

“A landowner has a duty to maintain his or her premises in a reasonably safe manner” (*Benjamin v. Trade Fair Supermarket, Inc.*, 119 AD3d 880, 881 [2d Dept 2014]; see *Basso v. Miller*, 40 NY2d 233 [1976]). “However, there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous” (*id.*; see *Benson v. IT & LY Hairfashion, NA. Inc.*, 94 AD3d 932 [2d Dept 2012]; *Holdos v. American Consumer Shows, Inc.*, 91 AD3d 823 [2d Dept 2012]; *Neiderbach v. 7-Eleven, Inc.*, 56 AD3d 632 [2d Dept 2008]; *Espinoza v. Hemar Supermarket, Inc.*, 43 AD3d 855 [2d Dept 2007]).

Defendants’ summary judgment motions are granted. 3044 established their entitlement to judgment as a matter of law by submitting evidence sufficient to demonstrate that the wheelchair lift was open and obvious and not inherently dangerous (see *Piareino v. Nouveau El. Indus., Inc.*, 116 AD3d 685 [2d Dept 2014]; see also *Mathis v. D.D. Dylan, LLC*, 119 AD3d 908 [2d Dept 2014]; *Terranova v. Staten Island University Hosp.*, 57 AD3d 765 [2d Dept 2008]). 3044 established that the lift is

approximately three to four feet wide and about five to six feet tall and has been in the same location every time Shcherba has visited the building in the past. Additionally, Enterprises and Medical Services established that they do not own the subject lift or the subject property. In opposition, Shcherba failed to raise a triable issue of fact. The wheelchair lift is an open and obvious condition, and Shcherba has failed to demonstrate that the lighting in the common area or the color of the lift contributed to the accident. In her deposition testimony, Shcherba stated that there were lights between the door and the elevators and that it was absolutely not dark there. Furthermore, she testified that she did not see the stairs as she did not pay attention to them because she knows them. Shcherba's argument alleging that the condition is a trap is conclusory. Accordingly, it is hereby

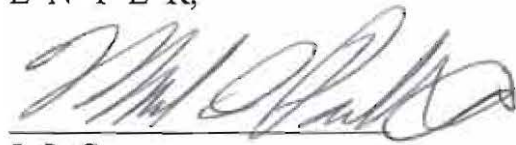
ORDERED that 3044's summary judgment motion is granted; and it is further

ORDERED that Enterprises and Medical Services summary judgment motion is granted.

This constitutes the decision, order and judgment of the court.

Nancy T. Smith
clerk

E N T E R,



J. S. C.

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HON. MARK I PARTNOW
 SUPREME COURT JUSTICE