Persaud v Persaud
2015 NY Slip Op 31994(U)
August 11, 2015
Supreme Court, Queens County
Docket Number: 19956/12
Judge: Duane A. Hart

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **DUANE A. HART** IAS PART 18
Justice

JUSTICE DUANE A. HART

SAVITRI PERSAUD,

Plaintiff(s),

-against-

KANITA PERSAUD and DIANA PERSAUD,

Defendant(s).

Index No.: 19956/12

Motion Date:
May 11, 2015

Cal. No.: 119

Mot. Seq. No.: 2

The following papers numbered 1 to 9 read on this motion by Defendants KANITA PERSAUD and DIANA PERSAUD, for an Order, pursuant to CPLR §3212, granting summary judgment in favor of said Defendant, dismissing Plaintiff's complaint as well as any and all cross-claims as against it on the issue of liability.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 9

Upon the foregoing papers, it is ordered that the motion by Defendants KANITA PERSAUD and DIANA PERSAUD for an Order, pursuant to CPLR §3212, granting summary judgment in favor of said Defendants, dismissing Plaintiff's complaint as well as any and all cross-claims as against it on the issue of liability, is granted, and Plaintiff's Complaint is dismissed.

Plaintiff in the above action seeks to recover for personal injuries arising out of an alleged slip and fall on rainwater that entered the house through an open window inside the premises located at 93-17 123rd Street, Queens County on September 28, 2009. Defendants KANITA PERSAUD and DIANA PERSAUD were the owners of the premises on the date of the incident. Plaintiff SAVITRI PERSAUD agreed with Defendants, in or around 2001, to live on the first floor of the subject premises but the parties did not sign a lease. Plaintiff SAVITRI PERSAUD had lived in the house since 1987, and owned the premises until selling it to Defendants KANITA PERSAUD

and DIANA PERSAUD. Plaintiff claimed that her injuries are the result of Defendants' negligence in the ownership, operation, maintenance, management and control of the subject floor.

Plaintiff commenced this action by filing a Summons and Complaint on September 26, 2012. Issue was joined by the service of Defendants KANITA PERSAUD and DIANA PERSAUD's Verified Answer on or about February 26, 2013. Discovery demands and responses were served, and depositions went forward. The Note of Issue with a Certificate of Readiness was filed on September 25, 2014.

Now, upon motion, Defendants KANITA PERSAUD and DIANA PERSAUD argue that they are entitled to summary judgment on the issue of liability as there is no proof of negligence with respect to the herein accident because the Defendants owed no duty to protect or warn the Plaintiffs of the wet floor, had no actual or constructive notice of the condition, and had no chance to remedy the condition because neither Defendant was present at the time of the rainfall or the accident.

In support of its motion, Defendants submitted the deposition testimonies of Plaintiff SAVITRI PERSAUD, and of Defendants KANITA PERSAUD and DIANA PERSAUD, daughters of Plaintiff and owners of the premises where the incident occurred.

In opposition, Plaintiff argued that Defendants did owe a duty to protect and warn her. And by leaving the window open, Defendants failed to meet the standard of care owed to Plaintiff. Plaintiff thus argued that there are issues of facts as to whether Defendants created a dangerous condition and whether they had actual or constructive notice of the condition.

It is well settled that a party appearing in opposition to a motion for summary judgment must bring proof and present evidentiary facts sufficient to raise a triable issue of fact. See Morgan v. New York Telephone, 220 A.D.2d 728, 633 N.Y.S.D.2d 319 (2d Dep't. 1995). Conclusory assertions devoid of evidentiary facts are insufficient. See Figueroa v. Gallagher, 20 A.D.3d 385, 798 N.Y.S.D.2d 143 (2d Dep't. 2005); Morgan v. New York Telephone, *supra*. Opposition to summary judgment cannot rest on surmise, conjecture, or speculation. See Paragon Cable Manhattan v. P&S 95th Street Assoc., 240 A.D.2d 255, 658 N.Y.S.D.2d 600 (1st Dep't. 1997).

To impose liability on a defendant as a result of an allegedly dangerous condition, there must be evidence that the dangerous condition existed, and that the defendant either created the condition, or had either actual or constructive notice of it, and

failed to remedy the dangerous condition within a reasonable time. Shea v. Massapequa Union Free School Dist., 117 A.D.3d 817, 985 N.Y.S.D.2d 675 (2d Dep't. 2014); Cuillo v. Fairfield Property Services, L.P., 112 A.D.3d 777, 977 N.Y.S.D.2d 353 (2d Dep't 2013). A general awareness that a hazardous condition may be present on the premises is insufficient to establish the required notice. Gershfeld v. Marine Park Funeral Home, Inc., 62 A.D.3d 833, 879 N.Y.S.D.2d 549 (2d Dep't 2009).

Based on the evidence submitted, Defendants owed no duty to protect or warn Plaintiff against the condition, as Plaintiff testified at her deposition that she believed rain would leak through the open window. Generally, a landowner must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk. Basso v. Miller, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 (1976). The scope of the duty varies with the foreseeability of the potential harm. See Tagle v. Jakob, 97 N.Y.2d 165, 168, 737 N.Y.S.2d 331, 763 N.E.2d 107 (2001). There is no duty, however, to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous. Bluth v. Bias Yaakov Academy for Girls, 123 A.D.3d 866 (2d Dep't 2014) (finding wet asphalt caused by a sprinkler is open and obvious), or where the allegedly dangerous condition can be recognized by common sense. Smith v. Stark, 67 N.Y.2d 693, 499 N.Y.S.2d 922, 490 N.E.2d 841 (1986). Generally, a condition is not "dangerous" or "hazardous" if it was readily observable through the ordinary use of one's senses. Jang Hee Lee v. Sung Whun Oh, 3 A.D.3d 473, 771 N.Y.S.2d 134, 135 (2d Dep't 2004).

Defendants demonstrated that an open and obvious condition existed which Plaintiff would recognize by using either common sense, or the ordinary use of her senses. Plaintiff testified that she believed if it rained while the windows were open, water would come in, thus recognizing the condition as a matter of common sense. Plaintiff testified that she did not look down to see the water when she went to close the window, although the room was well-lit. The Court of Appeals does not "equate obviousness with visibility." Vega v. Restani Const. Corp., 18 N.Y.3d 499, 507, 942, N.Y.S.2d 13, 18, 965 N.E.2d 240, 245 (2012). Even if the water was not visible, Plaintiff was aware that rain water could come in through the open window.

The evidence, as submitted, also indicated that Defendants did not have actual or constructive notice of the water on the floor. Because it is undisputed that Defendants were not on the premises during or after the rainfall, they had no actual notice of the

condition. To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to an accident to permit a defendant to discover and remedy the defect. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986). A general awareness that a dangerous condition may be present is legally insufficient to charge defendant with constructive notice. Gordon, 67 N.Y.2d at 838; see also, Carmona v. 40-25 Hampton, LLC, 65 A.D.3d 562 (2d Dep't 2009) (finding general awareness that tenants, at times, opened a staircase window was insufficient to raise a triable issue of fact as to whether defendant had constructive notice of the wet condition in the stairway).

Here, the Plaintiff testified that she and another daughter, Chandra, were present in the home and that they were not aware of the impending storm that arose on an otherwise nice day. Both Defendants testified that they were away at the time and were unaware of both the rain and any accumulation of water on the floor.

Finally, because Defendants were not present at the time of the storm or at the time water accumulated, they did not have adequate time to remedy the condition, even if the condition were dangerous and notice were imputed to them. Once a defendant has actual or constructive notice of a dangerous condition, the defendant has reasonable time to undertake remedial actions that are reasonable and appropriate, considering the circumstances. See Friedman v. Gannett Satellite Info. Network, 302 A.D.2d 491, 491-492, 755 N.Y.S.2d 412 (2d Dep't 2003). It would be unreasonable to expect the defendants to return from Florida to close the windows or mop up their floor. Plaintiff testified that she was expected to close the windows if it were to rain and cause an accumulation of water.

Upon review, Defendants' KANITA PERSAUD and DIANA PERSAUD made a *prima facie* showing of entitlement to judgment as a matter of law. Plaintiff failed to produce evidentiary proof sufficient to establish the existence of an issue of fact. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. NYU Med. Ctr., 64 N.Y.2d 851 (1985).

Dated: August 11, 2015

J.S.C.