Lumpkin v 3171 Rochambeau Ave., LLC
2016 NY Slip Op 30673(U)
March 17, 2016
Supreme Court, Bronx County
Docket Number: 306647/2008
Judge: Alison Y. Tuitt
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 FILED Apr 05 2016 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

ELISHA LUMPKIN,

Plaintiff,

-against-

3171 ROCHAMBEAU AVE, LLC, D&J MANAGEMENT and QUALITY CONSTRUCTION COMPANY & CONTRACTING,

Defendants.

INDEX NUMBER: **306647/2008**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 5,

Read on this Defendant Quality Construction Company & Contracting's Motion for Summary Judgment

On Calendar of **6/1/15**

Notice of Motion-Exhibits and Affirmation 1

Affirmations in Opposition 2, 3

Reply Affirmations 4, 5

Upon the foregoing papers, defendant Quality Construction Company & Contracting's (hereinafter "Quality") motion for summary judgment is denied for the reasons set forth herein.

The within action involves plaintiff's claim that she was injured on September 7, 2007 while walking down the steps to the entrance of the premises located at 3171 Rochambeau Avenue, Bronx, New York. The stairway was undergoing refurbishment at the time of the accident. Defendant Quality was hired to demolish the old stairs and pavement at the entrance to the building and replace them with limestone stairs and new bricks. Quality moves for summary judgment arguing that it is not liable for the plaintiff's accident as the condition was open, obvious and not inherently dangerous; it provided plaintiff with adequate warning of the alleged condition; the actual cause of the accident was plaintiff's careless procession down the stairway with a heavy garbage bag in each hand; the ongoing construction merely furnished the occasion of the incident but was

not its true cause; there was no reasonably feasible safety alternative for Quality to have utilized; and, use of the construction tape conformed with relevant industry standards.

The construction work on the stairway into the entrance of the building was being performed "half and half"; with half of the stairway was demolished and rebuilt and then the other half. Therefore, during the construction of this stairway, half of the stairway was accessible for persons going into and out of the building. Plaintiff testified at her deposition that at the time of the accident, there was a hole or "ditch" along the designated walking area on the stairway which ran between the old steps and the steps which were being newly constructed. At the time of the incident, the older steps were open for tenant use while the newer steps were marked off with yellow caution tape. The photographs submitted in support of the motion show that there was an open area between the old steps and the newer steps which was not barricaded in any way. There was no handrail or other structure to prevent someone from stepping off the step and falling into this "ditch" area. The photographs also depict yellow caution tape supported by cones on the newly constructed steps. Plaintiff testified that the accident occurred as she was walking down the steps with a heavy garbage bag in each hand. The stairway had three steps. As she was stepping down, her left leg slipped on the edge of the stairway and she fell into the ditch which was about 15 inches wide.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it

began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

The First Department has consistently held that the presence of an open and obvious dangerous condition does not negate defendant's responsibility to keep the premises reasonably safe. See Mizell v. Bright Services, Inc., 832 N.Y.S.2d 14 (1st Dept. 2007)("Even a hazardous condition that is open and obvious does not abate the duty to maintain the premises in a reasonably safe condition. Should the jury conclude that an unreasonably dangerous condition existed, the facts that the condition was readily observable are factors to be considered by the jury in determining the issue of comparative fault."); Gaffney v. Port Authority of New York and New Jersey, 753 N.Y.S.2d 808 (1st Dept. 2003)(Even if the alleged dangerous condition of the ramp was readily observable, such facts go to the issue of comparative negligence and will not negate its duty to keep the premises reasonably safe); Sanchez v. Lehrer McGovern Bovis, Inc., 756 N.Y.S.2d 44 (1st Dept. 2003) ("Assuming the groove was readily observable, such fact would not negate defendants' liability for failing to keep the premises reasonably safe but rather be a factor to be considered as part of comparative negligence").

Contrary to defendant Quality's contention, there is a question of fact as to whether defendant failed to maintain the subject construction area at the stairway in a reasonably safe condition. The photographs identified by plaintiff depict an open space between the old stairs and the stairs that were being newly constructed. There was no handrail or semi-permanent structure that would prevent a person from stepping off the step and falling into the "ditch" area. While Javed Iqbal, the co-owner of Quality argues that constructing a metal or wooden barricade blocking the gap from the open stairway was not feasible and is not standard practice in the industry, plaintiff's experts disagree and states that a handrail was required on the subject stairway

pursuant to the 1968 Building Code, and that defendant violated the Code in failing to provide a handrail. Plaintiff's experts estimated that the old steps plaintiff fell from were approximately 22 inches wide and the ditch that she fell into was approximately 10 inches wide. They opine that defendants knew or should have known that they needed to install at least one handrail, especially considering the 10 inch ditch for which there was no protection provided to prevent pedestrians from falling sideways into it. Yellow caution tape and movable cones were not sufficient to prevent someone from stepping off the step and going into this ditch.

Accordingly, defendant Quality's motion for summary judgment must be denied. There is a question of fact as to whether the subject stairway presented a hazardous condition. Moreover, with respect to Quality's claim that the cross-claims must be dismissed, the motion is also denied as there is a question of fact regarding Quality's negligence.

This constitutes the decision and Order of this Court.

Dated: 3/17/16

Hon. Alison Y. Tuitt