Samuels v Lee
2016 NY Slip Op 31023(U)
May 13, 2016
Supreme Court, New York County
Docket Number: 154383/13
Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ANTONIE SAMUELS and SOLOMON SAMUELS,

Plaintiffs,

- against-

SPRUYT E. LEE, TINA MAR, INC., Individually and d/b/a THE ART FARM IN THE CITY, and THE ART FARM IN THE CITY,

Defendants.

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Index No. 154383/13
Motion Seq. 002

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this personal injury action, defendants Spruyt E. Lee, Tina Mar, Inc., and The Art Farm in the City (collectively "Defendants") jointly move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them on the ground that they had no notice of the conditions that are alleged to have caused plaintiff Antonie Samuels' ("Plaintiff") injuries, namely a piece of sharp metal located at the bottom of the door to The Art Farm establishment and the door's fast closing speed. In opposition plaintiffs argue that Defendants are liable because they caused and created the door's condition and because the door's closing speed violated industry standards. For the reasons set forth below, Defendants' motion is granted.

Plaintiff alleges that she suffered personal injuries at The Art Farm in the City, an indoor activity center for young children ("The Art Farm"), on September 8, 2012. Her bill of particulars alleges that the bottom of the front door leading into The Art Farm ("Door") contained a jagged metal edge that protruded from the Door which cut her left heel as she entered the premises. Plaintiff's cut was closed with 14 stitches. It later developed an ulcer which required several months of treatment to heal. On July 1, 2014 Plaintiff was deposed regarding the incident.[1]

[1] A copy of Plaintiff's deposition transcript is submitted as Defendants' exhibit E (Samuels Dep).

[1]

She testified that on the date of the accident she was at The Art Farm for her granddaughter's birthday party. When she first entered the building her husband held the Door open for her. At approximately 1:30 pm she exited the building in order to bring some gifts to her car. Upon re-entering The Art Farm premises she grabbed the Door handle with her right hand, pulled it approximately 1/3 to 1/2 open, walked around the Door and took two steps in. (Samuels Dep, pp. 25, 24-35, 47-48). She then let go of the Door handle and placed her left hand on the Door's vertical edge while stepping in with her right foot over the threshold into the building. Before she was able to take the next step with her left foot the very bottom portion of the interior Door came into contact with and cut the rear of her left foot near her ankle and heel (*id.* at 51-54). The grandchildren's nanny, Ms. Marizela Ugarte, witnessed the incident. Ms. Ugarte told Ms. Samuels that after the accident she placed her hand underneath the Door and felt two pieces of sharp metal (*id.* at 56).

Ms. Ugarte was deposed on August 13, 2015.[2] She testified that she has taken care of Ms. Samuels' grandchildren for about eight years and is very familiar with The Art Farm because she often brought the children there after school. (Ugarte Dep, p. 10). Having entered through the Door on so many occasions, Ms. Ugarte was asked whether she had experienced any problems with it prior to the accident (*id.* at 19, 21, 23, 25-26):

Q. Now, you said that the door that you used was hard. What did you mean by that?

A. When you opened the door to get your stroller through it was very hard. The force, when it would close, you couldn't open it. You always needed help with it.

* * * *

Q. Did you tell anybody inside The Art Farm that the door was hard?

A. Not just me, everyone gave complaints.

* * * *

Q. You just said, ma'am, that people made complaints about the door. Who did they make the complaints to?

[2] A copy of her deposition transcript is submitted as Defendants' Exhibit Q (Ugarte Dep).

A. To the workers inside.

Q. Which workers?

A. The ones who taught there.

* * * *

Q. When these complaints were being made, was this outside The Art Farm?

A. Yes, in the waiting room. It's a little piece where they sell things at.

Q. But this was outside or inside?

A. Inside. Inside.

Q. And these people that said when is the door going to be fixed, do you know what they were talking about?

A. Because perhaps entering with the kids was a little difficult.

Q. But do you know what they were talking about? Not "perhaps," but do you know?

A. Yes, because I understood. You couldn't have two kids because you would have to push in the stroller because the door was too hard.

Q. Okay. When you say "hard," was it hard to open and push the stroller in?

A. Yes, because the door is hard and it was very heavy.

Q. But when you say "hard," was it hard to open?

A. Difficult to open and it was a heavy door.

Ms. Ugarte was later questioned regarding Plaintiff's accident (*id.* at 42-43):

Q. Before you left The Art Farm, did you have the opportunity to touch or feel the bottom of the door at The Art Farm?

A. Yes.

Q. How soon was that after the accident?

A. Like five minutes after she screamed. I saw it. It was like this . . . and I touched it to see, to see if there was something there.

Q. When you touched or felt underneath the door, describe for the record what you felt?

A. How do you say? It was sharp. Sharp. . . .

Q. The sharp area, do you know what kind of material it was made of; was it metal, was it wood? You tell me.

A. Metal.

The Art Farm's director, Ms. Valentina Van Hise, was deposed on July 1, 2014.[3] She testified that she was not aware of any problems with the Door prior to the accident. (Van Hise Dep, pp. 33, 38, 60-61). The motion papers contain an affidavit from Ms. Van Hise, the content of which is consistent with her deposition testimony (Defendants' exhibit S, ¶¶ 5-7, 18):

> The front door to The Art Farm premises which was in place on September 8, 2012 was installed in 2008 by an outside contractor, Parker Security. . . . Since its installation, the front door was not physically altered in any way by myself or any other The Art Farm employee or anyone acting on behalf of The Art Farm except for the installation of a security latch. Furthermore, from when the front door was installed to the day of Ms. Samuels' accident, neither The Art Farm nor any of its employees, including myself, changed or altered any of the components of the front door other than the security latch nor altered its operation in any way. . . . The front door in question, since the date of its installation, was never in a state of disrepair and, other than the installation of the security latch, was not repaired in any fashion as it was not required . . . . Until Ms. Samuels' accident on September 8, 2012, no one who visited The Art Farm sustained any injury because of the condition and/or operation of the front door situated there.

Ms. Van Hise's testimony was buttressed by the testimony of Emily Lee Spruyt, who owned and resided in the building where The Art Farm is located.[4] Ms. Spruyt has a private entrance for entry into her apartment but utilizes The Art Farm's Door nearly every day in order to retrieve her mail. She testified that she could not recall a time when the Door closed onto one of her legs as she walked through the doorway, that she never received any complaints from anyone regarding the Door, and that the Door never closed too quickly (Spruyt Dep, pp. 19-23, 24, 29, 24-35).[5]

Defendants contend that the Door was not defective and that they did not create or have actual or constructive notice of any alleged defective condition. In opposition plaintiffs argue that there were two conditions which led to Ms. Samuels' injuries, the Door's sharp metal edge and its fast closing speed. Plaintiffs argue that what they call the "jagged edge" was "created" by Defendants because they purchased the Door and supervised its installation. With respect to the

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[3] A copy of Ms. Van Hise's deposition transcript is submitted as Defendants' exhibit K (Van Hise Dep).
[4] A copy of Ms. Spruyt's deposition transcript is submitted as Defendants' exhibit M (Spruyt Dep).
[5] The parties also deposed plaintiff Solomon Samuels, non-party Douglas Cohen, and non-party Michelle Samuels Cohen.

closing speed, plaintiffs submit a report from a professional engineer who concludes that the rate at which the Door closes violates industry standards.[6] In reply Defendants argue that they cannot be deemed to have created the jagged edge because they purchased the Door from a third-party and had it installed by a third-party. Defendants also take issue with plaintiffs' expert in that his report makes no mention of the alleged jagged edge.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). However, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

It is also settled that landowners and business proprietors have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition. *Di Ponzio v Riordan*, 89 NY2d 578, 582 (1997); *Basso v Miller*, 40 NY2d 233, 241 (1976). While they are not insurers of the safety of people on their premises (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]),

[6] See Affidavit of Stanley Fein, P.E., sworn to February 16, 2016, submitted as Plaintiff's exhibit A (Fein Affidavit).

they must take reasonable care to ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the entrance which [it] invites the public to use." *Miller v Gimbel Bros., Inc.* 262 NY 107, 108 (1933); *see also Hackbarth v McDonalds Corp.*, 31 AD3d 498, 498 (2d Dept 2006). This duty to maintain property in a reasonably safe condition must be viewed in light of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury, and the burden of avoiding the risk. *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006). Business owners must provide members of the public with a "safe means of ingress and egress". *Id.*

In this regard, a defendant moving for summary judgment "has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition." *Mitchell v City of New York*, 29 AD3d 372, 374 (1st Dept 2006); *see also Keita v City of New York*, 129 AD3d 409, 410 (1st Dept 2015). "Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident . . . ." *Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 (1st Dept 2011). 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 the defendant to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof." *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008).

Plaintiffs' claim that the Defendants created a dangerous jagged edge condition because they purchased that Door model is without merit. The "cause and create" theory has traditionally been applied to contractors whose own negligent work contributes to someone's injury. *See, e.g., Camacho v City of New York*, 135 AD3d 482, 483 (1st Dept 2016); *Rajkumar v Budd Contr. Corp.*,

125 AD3d 446, 446 (1st Dept 2015); *Poplaski v City of New York*, 113 AD3d 449, 449 (1st Dept 2014). And while it may be possible for a cause and create theory of liability to be imputed to a tenant who hired the negligent contractor, it must also be shown that the tenant was actually on notice of a defect. *See Sejfuloski v Michelstein & Assoc., PLLC*, 2016 NY App. Div. LEXIS 1769, *2 (1st Dept 2016). In this case, the record does not provide evidence of a single accident relating to the Door prior to Ms. Samuels' incident, and Ms. Ugarte's testimony that the Door was "hard" does not equate to complaints about the Door's closing speed or an alleged jagged edge. Since the alleged metal protrusion was located on the underside of the Door it would not be visible or readily apparent. Defendants cannot be said to have acted unreasonably in failing to discover it.

Regarding the alleged closing speed of the door, Plaintiff relies on the affidavit of Stanley Fein, P.E. who opines that the "high speed at which the subject door closes would cause Plaintiff's injuries."[7] Specifically, Mr. Fein avers as follows (*id* ¶ 15-17):

> I have reviewed the deposition testimony of Ms. Marizela Ugarte. She testifies that she was near the door when this accident occurred and had felt the bottom of the door after she heard Plaintiff's scream. She described the bottom of the door as sharp metal.
>
> Based upon my inspection of the accident location, as well as my educational and professional experience, it is my opinion to a reasonable degree of engineering certainty that the subject door closes extremely fast. Additionally, the door operator that was installed was not properly adjusted and the door was closing with uncontrolled force and speed.
>
> The closing speed from a 90 degree opening position was three (3) seconds, while the American National Standards Institute (ANSI) standard is five (5) seconds.

It is important to note that that Mr. Fein's inspection occurred on May 11, 2015, nearly three and one half years after Plaintiff's accident. In and of itself this time lapse renders his opinion regarding the condition of the Door at the time of the accident conclusory speculation. *Bluth v Bias Yaakov Academy for Girls*, 123 AD3d 866, 867 (2d Dept 2014); *Burgos v Montemurro Enters. LLC*, 102 AD3d 629, 630 (1st Dept 2013); *Lopez v Fordham Univ.*, 69 AD3d 532, 533 (1st Dept 2010).

[7] Fein Affidavit, ¶ 18.

Conclusions of this nature have already been rejected by my colleagues in New York County Supreme Court cases for the very same reason. *See Torres v Nine-O-Seven Holding Corp.*, 2015 NY Misc. LEXIS 2863, *5 (Sup. Ct. NY Co Aug. 3, 2015, Wooten, J); *Segura v Scattered Sites, LP*, 2015 N.Y. Misc. LEXIS 1853, *7-8 (Sup. Ct. NY Co. May 18, 2015, Kern, J.); *Saxe v New York Univ. Hosp.-Downtown Beekman*, 2008 N.Y. Misc. LEXIS 10003 (Sup. Ct. NY Co. June 30, 2008, Edmead, J.).

I also find that Mr. Fein's general reference to the American National Standards Institute to be insufficient as he fails to identify the specific code provision upon which he relies in his analysis. *See Abraido v 2001 Marcus Ave.*, LLC, 126 AD3d 571, 572 (1st Dept 2015) ("The affidavit of plaintiff's expert was vague and conclusory, and thus insufficient to raise a triable issue, as it failed to reference specific, applicable safety standards or practices in support of his conclusions."); *Thornberg v Town of Islip*, 127 AD3d 1162, 1163 (2d Dept 2015) ("The plaintiff's expert . . . failed to identify any specific industry standard upon which he relied in concluding that the Town was negligent."); *Greco v Pisaniello*, 2014 N.Y. Misc. LEXIS 5451, * 9-10 (Sup. Ct. Bronx Co. Nov. 24, 2014, Aarons, J.) ("Although [plaintiff's expert] made reference to ASTM, and other organizations, he did not identify any particular section, guideline, or standard which stated that the minimum acceptable ratio was 0.50"). Nor does Mr. Fein set forth the number of times he actually tested the door for defects. For all we know he tested the Door only once, which if true would plainly fail to show that the Door regularly or even occasionally closed too quickly.

Most importantly, Mr. Fein's report does not independently confirm the existence of the alleged jagged edge. The only reasonable explanation for Mr. Fein omitting any reference to it in his report is that the condition no longer existed at the time of his inspection. Therefore, whether or not the Door was repaired and/or materially altered after the accident, Mr. Fein's report cannot be probative of whether the Door was defective on the date of the accident.

Accordingly, the court finds that Mr. Fein's report does not raise a triable issue of fact. But even if, for argument's sake, both the alleged jagged edge and the Door's alleged closing speed contributed to Plaintiff's injuries, there is nothing to show that Defendants were aware of or had actual or constructive notice of either condition prior to the date of the accident. Again, Plaintiff cannot rely on Ms. Ugarte's testimony that the Door was "hard" to operate. Such testimony referred to her difficulty in trying to open the door - a possible defect - but not one of the two defective conditions which Plaintiff claims caused her injuries.

Plaintiffs' burden on this motion is to show that Defendants were on notice of the specific defects alleged. *See Reed v Nouveau El. Indus., Inc.*, 123 AD3d 1102, 1103 (2d Dept 2014) (notice of a prior elevator issues did not provide notice of the specific defect that caused plaintiff's accident); *Mitchell v N.Y. Univ.*, 12 AD3d 200, 201 (1st Dept 2004) ("notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken."). Plaintiffs have failed to meet their burden.

Accordingly, it is hereby

ORDERED that the Defendants' motion for summary judgment is granted; and it is further

ORDERED that Plaintiff's action is dismissed in its entirety.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATE: 5-13-16

SHERRY KLEIN HEITLER, J.S.C.