

Aslanian-Persico v Park Reservoir Hous. Corp.

2016 NY Slip Op 31112(U)

May 11, 2016

Supreme Court, Bronx County

Docket Number: 301427/2009

Judge: Mary Ann Brigantti

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

MAY 16 2016

PRESENT: Honorable Mary Ann Brigantti
-----X
ARAM ASLANIAN-PERSICO,

Plaintiff,

-against-

DECISION / ORDER
Index No. 301427/2009

PARK RESERVOIR HOUSING CORPORATION, et als.,

Defendant
-----X

The following papers numbered 1 to 5 read on the below motion noticed on August 11, 2015, and duly submitted on the Part IA15 Motion calendar of **February 18, 2016**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def.'s Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exh.	3,4
Def.'s Reply Aff.	5

Upon the foregoing papers, defendant Park Reservoir Housing Corporation ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiff Aram Aslanian-Persico ("Plaintiff"), pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

This matter arises out of an alleged slip/trip-and-fall accident that occurred on October 11, 1989, inside of a cooperative apartment owned and operated by Defendant, and located at 3845 Sedgwick Avenue in the Bronx, New York. At the time of the accident, Plaintiff was approximately sixteen months old and lived at Apartment 14A of the premises with his parents, third-party defendants Isabella Persico-Aslanian and Azyechia Aslanian.

According to Plaintiff's bill of particulars, the accident occurred when Plaintiff was caused to fall on broken/cracked wooden flooring located within an "L-shaped" corridor between a closet and bedroom inside of the apartment. Plaintiff's mother, Isabella Persico-Aslanian, testified that on the date of the incident, she was inside the apartment with her daughter and Plaintiff. At 9:30AM, two maintenance workers arrived to perform work on windows located in the living room and master bedroom. Some time later, the two workers were on their way to the

master bedroom with Ms. Persico and her two children following behind. Suddenly, Plaintiff “screamed a lot” in pain. Ms. Persico turned around and saw Plaintiff had fallen at or near the corner of a wall in the L-shaped hallway. Plaintiff identified photographs of the floor and testified that Plaintiff had fallen on “cracks” or “gaps” in it, but she did not see precisely which “crack” caused him to fall. Plaintiff himself had little recollection of the incident, but testified that one of his earliest memories was striking his face on the corner of the wall in the hallway near the bedroom inside of the apartment. He could not, however, recall any further details about the incident. During discovery, Plaintiff has produced photographs purportedly depicting the hazardous condition that caused his accident. Ms. Persico testified that the photographs accurately depicted the floor at the time of the incident, except for some “filling in” done at an unspecified later date.

In February of 1989, approximately three months before Plaintiff’s family moved into the apartment, Ms. Persico accompanied a representative of the cooperative for a “walk-through” of the apartment. Ms. Persico testified that during the walk-through, she noted several issues with the apartment including its older appliances in the kitchen, the kitchen floor, and the windows in the living and bedrooms. Ms. Persico did not, however, raise an issue concerning the condition of the wood parquet floor in the apartment. Furthermore, Ms. Persico testified that she never notified Defendant of any problems with the wooden parquet floors between the time of the inspection and the time of the incident.

Howard Leventhal, president of Defendant’s Board of Directors, testified that when possession of an apartment is turned over, the property manager conducts an inspection of the apartment and makes repairs, if necessary, before any new tenants take possession. Mr. Leventhal was made aware of this incident after it occurred, when a report was filed by Ms. Persico. An inspector responded to the apartment, but found no problems with the wood floor. Mr. Leventhal was unaware of any prior complaints or repairs regarding the floor inside the apartment. He testified that once cooperators took possession of an apartment, it was their obligation to maintain it. Dimitar Krstevski, who worked inside of the building at the time of this incident, had no knowledge of any complaints or repairs made with respect to this apartment’s wood flooring.

Defendant now moves for summary judgment, asserting that any alleged defect in the floor was trivial and not actionable. Further, the testimony establishes that neither Plaintiff nor his mother actually knows what caused Plaintiff to fall. Since Plaintiff cannot link the allegedly defective condition to the accident, the action must be dismissed. Finally, assuming that there was a dangerous condition, Defendant did not create or have actual or constructive notice of it. The apartment was inspected three months before Plaintiff's family moved in, and Plaintiff's mother never complained about the condition before the accident occurred.

Plaintiff opposes the motion, and argues that Defendant admits that it inspected the apartment before Plaintiff's family moved in. Further, Defendant knew that young children would be moving into the apartment. Therefore, regardless of whether Ms. Persico complained about the condition at the time, Defendant was present, and knew or should have known that the cracked/gapped wooden tile existed. Plaintiff submits original photographs of the alleged defect, and asserts that they depict tripping hazards for a sixteen month-old. At her deposition, Ms. Persico testified that there was "more than one crack, they're between tiles, the kids was caught in one crack..." and explained that the child's shoe depicted in the photograph was pointing to where the cracks were. Plaintiff argues that it would be speculative to assume that Plaintiff fell for any reason other than the crack. Further, the Court is required to draw all inferences in favor of Plaintiff. Here, the circumstantial evidence demonstrates that a defective condition in the wood flooring caused Plaintiff's accident.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable

to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Defendant argues that its motion must be granted because the defect at issue is trivial and therefore not actionable as a matter of law. In New York, there is no “minimum” actionable defect dimension (*Trincere v. County of Suffolk*, 90 N.Y.2d 976 [1997]). Therefore, granting summary judgment to a defendant “based exclusively on the dimension[s] of the ... defect is unacceptable” (*Id.*, at 977-978). Instead, whether a dangerous condition exists so as to create liability depends on the facts and circumstances of each case and is generally a question of fact for the jury (*Id.*, citing *Hecht v. City of New York*, 60 N.Y.2d 57 [1983]). In evaluating whether a defect is actionable, a Court must consider, among other things, “the width, depth, elevation, irregularity, and appearance of the defect as well as the time, place, and circumstance of the injury” (*Trincere*, 90 N.Y.2d at 978).

The Court of Appeals has recently reaffirmed the principle that a “defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses” (*Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66 [2015]). “*Trincere* and the line of cases in which it stands establish the principle that a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it ‘unreasonably imperil[s] the safety of’ a pedestrian” (*Id.* at

78). For example, a physically small defect may be actionable if it possessed a jagged edge, an irregular surface, there were other defects in the vicinity, lighting was poor, or the defect was located in heavily-traveled walkway where pedestrians are usually distracted from looking down at their feet (*Id.*). To obtain summary judgment on these grounds, Defendant bears the burden of conclusively establishing that the defect is trivial. “Summary judgment should not be granted to a defendant on the basis of ‘a mechanistic disposition of a case based exclusively on the dimension[s] of the . . . defect’ (*Trincere*, 90 NY2d at 977-978), and neither should summary judgment be granted in a case in which the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive (see section VII, discussing Adler)” (*Id.*, at 84).

In this matter, Defendant has established that the alleged defect was trivial and not actionable as a matter of law. Photographs submitted in support of the motion, and relied upon by Plaintiff in opposition, show no perceptible defect in the floor where this accident allegedly occurred (see *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d at 83 [photographs that are acknowledged to fairly and accurately represent the accident site may be used to establish triviality]). At her deposition, Plaintiff’s mother, Ms. Persico, testified that these photographs depict one or more “cracks” or “gaps” in the floor. She did not, however, identify the measurements of the condition or offer any testimony as to how the “gaps” or “cracks” could have constituted a snare or trap (see *Forrester v. Riverbay Corp.*, 135 A.D.3d 448 [1st Dept. 2016]; *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66). Plaintiff does not provide any further description of the alleged defect in opposition to the motion, and therefore he has failed to raise an issue of fact as to whether “its intrinsic characteristics or the surrounding circumstances magnif[ied] the dangers it pose[d], so that it unreasonably imperil[ed] the safety of [plaintiff] ... or “whether the defect was difficult for [plaintiff] to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances” (*Hunter v. New York City Housing Authority*, 137 A.D.3d 717 [1st Dept. 2016], quoting *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66 [internal quotation marks omitted]).

Even assuming, *arguendo*, that the alleged defect was actionable, and further assuming that the Plaintiff has sufficiently identified the cause of his accident (see, e.g., *Kovach v. PJA, LLC.*, 128 A.D.3d 445 [1st Dept. 2015]), the motion must be granted because Defendant did not

create, or have actual or constructive notice of this defect. To impose liability upon a landowner in a premises liability-related action, there must be evidence that a dangerous or defective condition existed and that the defendant either created or had actual or constructive notice of the condition (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]). To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it (*see 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]). The notice required must be more than general notice of any defective condition. (*Id.*) The law requires notice of the specific condition alleged at the specific location alleged (*Id.*)

Here, Ms. Persico testified that in February 1989, approximately three months before her family moved into the subject apartment, she and a representative of the cooperative conducted a walk-through of the apartment. While Ms. Persico noticed issues with, among other things, the appliances, the kitchen floors, sink, and bathtub, she did not identify any problems with the wood floor where this accident allegedly occurred. From the time Plaintiff's family moved into the apartment up until the time of the accident, they never made complaints to building management or to Defendant about the specific condition of the wood floors that allegedly caused this accident (Ms. Persico July 13, 2012 EBT at p 52:21-25; 53:1-25; 54:1-7). Mr. Levanthal, President of Defendant's Board of Directors as of the time of the accident, was unaware of any prior complaints or repairs with respect to the wood floors in the apartment before the accident occurred (Levanthal EBT at 40, 42, 49). The foregoing testimony establishes, *prima facie*, that Defendant did not create, and had no actual or constructive notice of any hazardous condition in the apartment (*see Pintor v. 122 Water Realty, LLC.*, 90 A.D.3d 449 [1st Dept. 2011]).

In opposition, Plaintiff has failed to raise a genuine issue of fact with respect to notice. The photographs, alone, do not demonstrate that any alleged defect was visible and apparent at the time the apartment inspection took place, three months before Plaintiff's family moved in. As noted *supra*, Plaintiff's parents did not complain about the condition at that time or any time before the accident occurred.

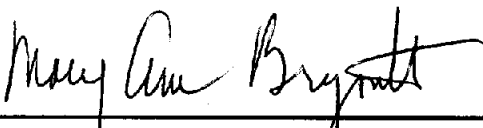
IV. Conclusion

Accordingly, it is hereby

ORDERED, that defendant Park Reservoir Housing Corporation's motion for summary judgment is granted, and the Plaintiff's complaint and any cross-claims asserted against the moving defendant are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 5/11, 2016



Hon. Mary Ann Brigantti, J.S.C.