Mercado v Bank of Am.
2016 NY Slip Op 31123(U)
May 9, 2016
Supreme Court, Bronx County
Docket Number: 308513-12
Judge: Fernando Tapia
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 FILED May 10 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13

LUIS MERCADO, JR. (As the Administrator of the Estate Of LUIS MERCADO) and FRANCISCA MERCADO

Plaintiffs,

v. **Index No. 308513-12**

BANK OF AMERICA, HARPREET LEGHA d/b/a SUBWAY and RENALI REALTY GROUP 1, LLC,

Defendants.

DECISION

On September 8, 2012, Plaintiff's deceased father tripped and fell on uneven pavement at the subject sidewalk, causing death from complications from the fall.[1]

Defendant-Bank of America [BoA] moves for summary judgment under CPLR 3212 to dismiss the Complaint, claiming that there are no material issues of fact. Defendant-Renali Realty Group 1, LLC, cross-moves for summary judgment under CPLR 3212 too.

After careful review of the motion papers, this Court hereby **GRANTS** BoA's motion and **DENIES** Renali's cross-motion -- material issues of fact exist regarding Renali's duty to maintain the subject sidewalk.

Under CPLR 3212(b), a motion for summary judgment must be supported by affidavit, a copy of its pleadings, and any other available proof. Regarding the affidavit, not only must it have a recitation of material facts, but it must also show that there is no defense to the action, or that the defense is meritless. Because a motion for summary judgment has an extremely high burden ["as a matter of law"], it is a drastic remedy for any movant to use. *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 (App Ct 1978). It is therefore the movant's burden to produce evidence as would be required in a trial. *Oxford Paper Co. v.*

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[1] The subject sidewalk straddled between 3422 & 3424 Jerome Avenue, Bronx, NY.

S.M. Liquidation Co., Inc., 45 Misc2d 612, 614 (Sup Ct, NY Cty 1965); see also *Pirrelli v. Long Island Rail Road*, 226 AD2d 166 (App Div 1st Dept 1996) (the purpose of the motion court is issue-finding, and not issue-determination). Lastly, a summary judgment motion cannot be defeated by a "shadowy semblance of an issue." *Hatzis v. Belliard*, 13 AD3d 106 (App Div, 1st Dept 2004).

A defendant seeking summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition, or that it did not have constructive or actual notice of its existence. *Sabalza v. Salgado*, 85 AD3d 436, 437-38 (App Div, 1st Dept 2011). Furthermore, it is a defendant's burden to show lack of notice as a matter of law. *Giuffrida v. Metro North Commuter R. Co.*, 279 AD2d 403, 404 (App Div, 1st Dept 2001).

Proximate cause is an act or omission that is regarded as a cause of injury if it was a substantial factor in bringing about the injury. See PJI 2:70. Additionally, a plaintiff has to show proof of facts and conditions from which a defendant's negligence, and the causation of the accident by that defendant's negligence, can be inferred. *Ingersoll v. Liberty Bank of Buffalo*, 278 NY 1, 7 (App Ct 1938). Such proof of a finding of proximate cause must be grounded on logical inferences from the evidence, and not grounded on speculation. *Schneider v. Kings Hwy Hosp Ctr Inc.*, 67 NY2d 743, 745 (App Ct 1986).

Renali is the commercial landlord, and BoA is the commercial tenant in this action. CBRE is the agent [or facility manager] for BoA's ATM locations. See Wachenfeld Tr. at p. 24, lines 12-24. Mr. Wachenfeld, on behalf of BoA, attested that Renali, as landlord, would be responsible for the maintenance of the subject sidewalk. Id. at p. 22, lines 7-20; p. 42, lines 2-13; p. 31, lines 2-23. BoA therefore dispels the argument that it should be liable because the responsibility lies with Renali, the landlord. In other words, BoA contends that summary judgment is proper because Renali conceded that BoA had no contractual obligation regarding the maintenance and repair of the subject sidewalk. See Poulis Reply at ¶ 3.

In contrast, Renali argues that this matter has no evidence regarding the direct cause of the accident, and therefore, there would be no duty owed to Plaintiff's deceased father. See Dieudonne Jr. Aff.

at ¶¶ 12-13. To refute Renali's "lack of duty owed" claim was non-party witness, Mr. Alberto Mercado, who saw the trip and fall at the subject sidewalk. Plaintiff, who represents his deceased father, was there at the time of the accident, but he did not witness the actual fall. See Mercado Jr. Tr. at p. 82, lines 21-23; p. 83, lines 2-19; p. 95, lines 4-23.[2] He did, however, notice that blood was coming from the back of his father's head, which had a hematoma. Id. at p. 94, lines 3-12. In addition, Plaintiff attested that he was surprised that his father's cause of death was hypertensive cardiovascular disease, and not from the trip and fall. Id. at p. 65, lines 6-20; p. 66, line 4-8.

Under common law, an owner of real property has the duty to maintain the property in a reasonably safe condition. *Peralta v. Henriquez*, 100 NY2d 139, 143 (App Ct 2003); *Bolte v. City of New York*, 48 Misc3d 1208(A) at *4 (Sup Ct, Bronx Cty 2015). Even assuming that the hazardous condition was open and obvious, such evidence would go towards the issue of comparative negligence. *Garcia v. Mack-Cali Realty Corp.*, 52 AD3d 420, 421 (App Div, 1st Dept 2008). Furthermore, whether a sidewalk defect is sufficiently hazardous to impose liability is generally a question of fact for the jury. *Tineo v. Parkchester South Condominium*, 304 AD2d 383 (App Div, 1st Dept 2003).

Also, there is no minimal dimension test that a defect must be of minimum height or depth in order for the claim to be actionable. *Id.*; see also *Santulli v. City of NY*, 287 AD2d 352 (where the First Department held that genuine issues of material fact existed as to whether sidewalk depression was trivial and as to whether it was open and obvious).

Here, Renali, as the landlord, is liable for the maintenance of the subject sidewalk, as attested by Ms. Renee Kulick, the property manager at Renali. See Kulick Tr. at p. 44, lines 7-21. She also attested that post-accident, Renali did not inspect the subject sidewalk. Id. at p. 25, lines 16-23. This Court agrees with Plaintiff's attorney that Mr. Mercado's attestations, coupled with Ms. Kulick's attestations, show that Renali should have known about the defective condition of the subject sidewalk. See Resnick Aff. at p 21.

[2] According to Plaintiff, non-party witness Mr. Alberto Mercado saw the fall which was on the sidewalk.

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In sum, BoA's motion is **GRANTED** and Renali's cross-motion is **DENIED**. Material issues of fact regarding whether the subject sidewalk was open and obvious, as well as Renali's breach of duty owed to Plaintiff, must be resolved at trial, should the parties not settle. All parties are **ORDERED** to appear before J.H.O. Paul Victor on **May 16, 2016**, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

Dated: May 9, 2016
Bronx, NY

Hon. Fernando Tapia, J.S.C.