Sorgho v 6056 Owners Co., LLC
2016 NY Slip Op 31385(U)
July 14, 2016
Supreme Court, New York County
Docket Number: 160984/2013
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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BLAISE SORGHO,

Plaintiff,

-against-

6056 OWNERS COMPANY, LLC and
HARVARD PROTECTION SERVICES, LLC,

Defendants.

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Index No. 160984/2013
Motion Seq. 002 and 003

DECISION & ORDER

KELLY O'NEILL LEVY, J.:

The court consolidates two motions for disposition in this trip and fall case. In the first, defendant/third-party plaintiff, building owner 6056 Owners Company, LLC ("Owners"), moves for summary judgment seeking dismissal of the complaint, asserting that the sidewalk elevator system in front of its building complied with all applicable codes and standards and that Owners did not have notice of the transient condition of the partially open elevator sidewalk doors, which it alleges was created by co-defendant Harvard Protection Services, LLC's ("Harvard Protection") employee. Plaintiff opposes and Harvard Protection opposes to the extent that the motion calls for a determination that a dangerous condition existed and that Harvard Protection created, caused, or had notice of the alleged condition.

In the second motion (mot. seq. 003), defendant Harvard Protection, a company that provides building services, seeks summary judgment arguing that the condition of the raised sidewalk elevator at issue was open and obvious and as such it was not negligent. Plaintiff opposes the motion.

Facts

Defendant Harvard Protection provides building security and concierge services for the building at 60 East 56th Street between Madison Avenue and Park Avenue ("the building") in Manhattan. Owners owns the building and for several years prior to the incident, leased the basement level to retailers as an inventory storage area. The tenant, Tommy Hilfiger, was allowed access to the basement by using the sidewalk elevator system.

The sidewalk elevator at issue is comprised of two diamond plate steel panels that are hinged on opposite sides and open in the center. The elevator travels 10 to 12 feet between the basement landing of the building and the sidewalk. It takes approximately five seconds for the elevator to come in contact with the steel panels and roughly 20 seconds for the elevator to push the panels up toward a 90-degree angle at which point the elevator can be accessed at street level.

According to the deposition of Harvard Protection employee, Carlos Figueroa ("Figueroa"), when Tommy Hilfiger employees ask to access the basement Figueroa will first retrieve the controller that operates the sidewalk elevator from his desk. He then sets out two yellow "Wet Floor" signs (one sign over the wire that plugs into the wall for the controller and one sign on the other side of the steel panels), checks for pedestrian traffic, and uses the controller to bring up the elevator from the basement to street level. Figueroa testified that he follows this procedure based on the training he received from Dennis Okola, the building superintendent.

At around noon on July 2, 2013, employees from Tommy Hilfiger requested access to the basement. Figueroa used the opportunity to train Joseph Bertuna ("Bertuna"), another Harvard Protection employee, on how to operate the sidewalk elevator. Figueroa stated that when he went outside, a line of approximately 75 customers patronizing a local eatery had crossed in front

of the building. He testified that he had to direct people to move in order to make space to open the elevator doors. Figueroa then looked to see if there were any pedestrians approaching and, according to his testimony, did not see anyone approaching from either direction. However, Bertuna stated that pedestrian traffic was busy, with people passing both east and west.

At this time, the plaintiff, Blaise Sorgho ("Sorgho") was walking east on East 56th Street between Madison and Park Avenues. According to Figueroa, Sorgho was walking "pretty fast" and was using his cell phone. Bertuna, on the other hand, testified that Sorgho's pace was slow, and that he never saw him with a cell phone.

Sorgho claims that as he approached the area, he saw two men dressed in suits to his right (Figueroa and Bertuna) facing Park Avenue. As he passed them, Sorgho's left foot tripped on the opening elevator doors. Bertuna stated that the door had been opening for about two seconds when Sorgho's foot hit the panel. Sorgho fell in the space between the elevator doors and hit his knee on the panel. Figueroa and Bertuna both testified that the other called out to get Sorgho's attention immediately before he tripped in order to prevent the incident. It is unclear as to whether the yellow "Wet Floor" warning signs had been placed prior to the incident. Figueroa testified that he had placed the signs as usual, and Sorgho had walked over a yellow warning sign, causing it to fall over. Bertuna testified that he did not place any warning signs and did not recall if Figueroa had placed any warning signs. Sorgho also stated that he did not see any yellow warning signs.

On November 22, 2013, Sorgho commenced an action against Owners claiming that the accident was caused by the negligent manner in which the elevator doors were operated on the day of the incident. On September 10, 2014, Owners commenced a third-party action against Harvard Maintenance, Inc., seeking common-law indemnification and contribution. On

November 20, 2014, the complaint was amended to include Harvard Protection as a defendant to the main action. Owners then amended its complaint and asserted cross-claims against Harvard Protection for common-law indemnification and contribution. Harvard Protection answered on December 17, 2014 and asserted cross-claims against Owners for contribution and indemnification. Owners subsequently moved for summary judgment under motion sequence 002 to dismiss the complaint and any and all cross-claims asserted against it. Harvard Protection also moved for summary judgment (motion sequence 003) seeking dismissal of the claims, cross-claims, counterclaims, and any other claims against it. The motions are denied for the reasons set forth below.

Discussion

To prevail on a motion for summary judgment, it must be clear that no material and triable issue of fact remains. *Sillman v. Twentieth Century-Fox Film Corporation*, 3 NY2d 395 (1957); *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065 (1979). The proponent has the initial burden of proving entitlement to summary judgment. *Winegrad v. NYU Medical Ctr.*, 64 NY2d 851 (1985); *Brill v. City of New York*, 2 N.Y.3d 648, 650-51 (2004). Once such proof has been offered, the burden shifts to the party opposing the motion who must proffer evidence in admissible form and "show facts sufficient to require a trial of any issue of fact." CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). Applying those standards here, the motions must be denied.

The court will first address Owners' motion. Administrative Code of the City of New York § 7-210 imposes upon the owners of real property a non-delegable duty to maintain the

sidewalk abutting its premises in a reasonably safe condition. *See also*, *Reyderman v. Meyer Berfond Trust # 1*, 90 A.D.3d 633, 634 (2d Dep't 2011). However, Section 7-210 does not impose strict liability upon the property owner. In order to be liable, the injured party must prove the elements of negligence, specifically (1) that the defendant owed a duty to the plaintiff, (2) the defendant breached this duty, and (3) the plaintiff was injured as a result of the breach. *See*, *Martinez v. Khaimov*, 74 A.D.3d 1031, 1031 (2d Dep't 2010).

On a motion for summary judgment invoking § 7-210, "the property owner has the initial burden of demonstrating, prima facie, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Harakidas v. City of New York*, 86 A.D.3d 624, 627 (2d Dep't 2011). *See also*, *Gyokchyan v. City of New York*, 106 A.D.3d 780, 781 (2d Dep't 2013).

6056 Owners contends that the sidewalk elevator system conformed to all applicable codes and standards and therefore did not create the hazardous condition. By affidavit, 6056 Owners' expert, William J. Meyer, P.E., an engineering consultant, states that based on his expertise and upon review of the New York City Department of Building's records, the sidewalk elevator system conformed to all requirements of the Elevator Safety Code (AMSE A17.1) and was subject to routine inspections by New York City.

However, plaintiffs' expert, Anthony Mellusi ("Mellusi"), a certified safety engineer, states in his affidavit that based on his investigation and analysis, the operation of the elevator requires two people, one to operate the controller and a second to direct pedestrian traffic away from the elevator when it is in use. Figueroa and Bertuna both stated that at the time of the incident Figueroa was teaching Bertuna how to operate the sidewalk elevator. Sorgho provided testimony that both Figueroa and Bertuna were standing on the right with their backs to him

facing Park Avenue as he walked down the street. Therefore, there is an issue as to whether Figueroa and Bertuna were directing traffic walking toward Park Avenue when the alleged incident occurred.

Moreover, Figueroa stated that on the day of the incident, he had placed yellow caution signs on either side of the elevator doors in order to warn pedestrians of the raising elevator and that Sorgho had tripped over the yellow sign as he pushed past him. However, contrary to Figueroa's testimony, both Sorgho and Bertuna testified that they did not see any yellow caution signs that would indicate the dangerous condition. Mellusi stated in his affidavit that "Wet Floor" signs used to caution pedestrian traffic would be insufficient in providing visual cues and warnings to prevent pedestrians from walking directly into the doors as they were being raised. In addition to the lack of an audible alarm or flashing lights, it is Mellusi's professional opinion that "the procedures [put] in place by the building management are clearly in violation of what is considered to be good and accepted safety practices for the operation of the sidewalk elevator in guarding against injury to pedestrian traffic." *See*, Mellusi Aff. at ¶ 12.

Despite evidence that the elevator system itself complied with applicable codes and standards, 6056 Owners has failed to establish that the protocol in place for operation of the sidewalk elevator maintained a reasonably safe condition of the sidewalk or that the protocol did not create the hazardous condition that allegedly caused Sorgho's injuries. 6056 Owners contends that the plaintiff must establish that the defendant created or had actual or constructive notice of the hazardous condition in order to recover damages resulting from the defendant's alleged failure to maintain its premises in a reasonably safe condition. However, to be entitled to summary judgment, the property owner must demonstrate that it did not create the hazardous

condition. Thus material issues of fact remain and 6056 Owners' motion for summary judgment must be denied.

Similarly, in its motion, Harvard Protection has failed to make a showing of entitlement to judgment as a matter of law and material issues of fact remain as to whether the hazardous condition that caused Sorgho's injuries was open and obvious and whether the defendant operated the sidewalk elevator in a reasonably safe manner.

Negligence requires the foreseeable danger of injury to another and conduct unreasonable in proportion to the danger. A defendant is not responsible for the consequences of his conduct unless the risk of injury was reasonably foreseeable and the injury, as a result of negligent conduct, was not merely possible but probable. *See*, New York Pattern Jury Instructions – Civil, PJI 2:12.

In general, landowners have a duty to prevent occurrences of foreseeable injury, however, a landowner may not be held liable when the dangerous condition was open and obvious rather than latent. *Diven v. Hastings-On-Hudson*, 156 A.D.2d 538, 539 (2d Dep't 1989). Harvard Protection claims that the hazardous condition that led to Sorgho's injuries was open and obvious and therefore it is not liable for plaintiff's injuries. Sorgho testified at his deposition that he was looking ahead of him the entire time he was walking down the street and saw two men (Figueroa and Bertuna) standing outside the building. Harvard Protection contends that the danger of the opening sidewalk elevator doors should have been readily apparent to anyone looking ahead while walking down the street. Furthermore, Figueroa stated that he had placed yellow cautions signs on either side of the elevator doors in order to warn pedestrians of the raising elevator and that Sorgho had tripped over the yellow sign as he pushed past him. As

articulated in *Tagle v. Jakob*, a court may find that a risk was open and obvious as a matter of law based on clear and undisputed evidence. 97 N.Y.2d 165, 169 (2001).

There is conflicting testimony on whether the condition was open and obvious thus rendering summary judgment inappropriate here. *See Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 75-76 (1st Dep't 2004). Contrary to Figueroa's testimony, both Sorgho and Bertuna testified that they did not see any yellow caution signs that would indicate the dangerous condition. Figueroa testified that he did not see any pedestrian traffic in either direction, yet Bertuna testified that there were people passing in both directions. The evidence presented leaves open the question of whether the hazardous condition was open and obvious as it remains unclear as to whether any warning signs were placed near the sidewalk elevator or if the pedestrian traffic on the sidewalk may have prevented Sorgho from avoiding injury.

Accordingly, it is hereby

ORDERED that the motion by defendant/third-party plaintiff 6056 Owners Company, LLC (mot. seq. 002) for summary judgment is denied; and it is further

ORDERED that the motion by Harvard Protection Services, LLC for summary judgment (mot. seq. 003) is denied.

This constitutes the decision and order of the court.

ENTER:

Dated: July 14, 2016

Kelly O'Neill Levy

Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY