

Beaver-Gale v Waldorf Astoria Hotel

2016 NY Slip Op 31521(U)

August 10, 2016

Supreme Court, New York County

Docket Number: 158368/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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BERNADETTE BEAVER-GALE,

- Plaintiff,

DECISION/ORDER
Index No. 158368/2013

-against-

WALDORF ASTORIA HOTEL,

Defendant.

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HON. CYNTHIA KERN, J.:

Plaintiff Bernadette Beaver-Gale commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell at the defendant Waldorf Astoria Hotel's (the "Waldorf Astoria") property. Defendant now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint. For the reasons set forth below, defendant's motion is granted.

The relevant facts are as follows. Defendant owns and operates the Waldorf Astoria, which is located at 100 East 50th Street, New York, New York (the "hotel"). Plaintiff alleges that on July 4, 2013, she fell when she was leaving the hotel through its exit on 49th Street (the "accident"). There is an elevated gold-colored metal landing with a tread (the "landing") between the hotel's 49th Street exit and the sidewalk, which is covered with dark carpet. Plaintiff testified at her deposition that she was at the hotel to pick up customers for a cruise as part of her job with non-party Intercruises and was leaving the hotel when the accident occurred. She further testified that at approximately 3:00 p.m., she left through the hotel's 49th Street exit, looked straight ahead as she took approximately three steps on the landing and then failed to notice that the landing ended in an elevation drop to the sidewalk, causing her to fall. Plaintiff does not claim that any debris or substance on the landing caused her to trip, but rather that she did not see the elevation difference between the landing and the sidewalk.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. See *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

It is well established that “[a] landowner has a duty to maintain its property in a reasonably safe condition in view 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 A.D.3d 319, 322 (1st Dept 2006). However, a landowner is not liable for a plaintiff’s injuries where the condition complained of was open, obvious and not inherently dangerous. *Gonzalez v. Mount Vernon Neighborhood Health Center, Inc.*, 135 A.D.3d 618, 618 (1st Dept 2016) (upholding an order awarding summary judgment dismissing the complaint on the ground that the condition was open, obvious and not inherently dangerous); *Villanti v. BJ’s Wholesale Club, Inc.*, 106 A.D.3d 556, 557 (1st Dept 2013) (also upholding an order awarding summary judgment dismissing the complaint on said ground).

In the present case, defendant has established its *prima facie* entitlement to summary judgment dismissing plaintiff’s complaint by submitting evidence that the elevation difference between the landing and the sidewalk was open, obvious and not inherently dangerous. Scott E. Derector, P.E. (“Derector”), defendant’s engineering expert, stated in his affidavit that “all elements of the entranceway were in good condition, free of any broken or damaged sections and the area was well illuminated by way of natural and artificial lighting” at the time of his inspection and that the landing did not violate any “known applicable code, standard or regulation.” Derector further stated that the change in elevation between the gold-colored landing and the sidewalk, covered by dark carpet, was open and obvious. Candace Robinson, an overnight security manager, testified during her deposition that she inspected the landing immediately after the accident occurred and did not see anything, including any debris or substance, that could have caused

plaintiff to fall. She further testified that she did not know of any prior complaints or similar accidents involving the landing prior to plaintiff's accident. Further, pictures of the landing submitted in support of the motion show that the area where plaintiff fell is well lit, there are no visible defects and the landing is a different color than the carpet covering the sidewalk.

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff's argument that there is an issue of fact as to whether the elevation difference between the landing and the sidewalk was not open and obvious and was inherently dangerous on the ground that the conditions created optical confusion is without merit. Although a visible step is generally not inherently dangerous, "a step may be dangerous where the conditions create 'optical confusion' – the illusion of a flat surface, visually obscuring the step." *Langer v. 116 Lexington Ave., Inc.*, 92 A.D.3d 597, 599 (1st Dept 2012). "Findings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition." *Id.* (internal citations and quotations omitted). See also *Saretsky v. 85 Kenmare Realty Corp.*, 85 A.D.3d 89, 92-93 (1st Dept 2011) (finding a triable issue of fact as to whether a step that was a similar shade of gray as the sidewalk was a dangerous condition due to optical confusion). In *Langer*, the First Department held that the conditions regarding a single step transition into a second-floor banquet room did not create optical confusion, noting that the plaintiff had testified that she did not see the transition when she was looking straight ahead into the banquet room, which established that she was "not looking." *Langer*, 92 A.D.3d at 599-600.

In the present case, the court finds that the conditions regarding the landing did not create optical confusion. As was the case in *Langer*, the mere fact that plaintiff did not notice a single step transition when she was looking straight ahead is not evidence of "optical confusion." Moreover, plaintiff does not dispute that the area of the 49th Street exit was well illuminated and that the landing was a different color than the carpet covering the sidewalk.

Plaintiff's argument that the affidavit and report of Scott M. Silberman, P.E. ("Silberman"), her engineering expert, raise an issue of fact as to whether the condition of the landing deviated from industry

custom or practice is also without merit. The only basis Silberman cites for his opinion in his report that single steps should be avoided where possible and, where they cannot be avoided, that “[g]ood practice demands highlighting the step’s nosing with delineation stripes of contrasting colors or similar treatment applied to the nosing edge or provide [sic] warning signs” or handrails is American Society of Testing Materials (“ASTM”) Standard F1637. ASTM Standard F1637 provides that “[s]hort flight stairs (three or fewer risers) shall be avoided where possible” and otherwise should be made visually obvious through the use of visual cues, one of which is “contrast in surface colors.” As it is undisputed that the landing is a different color than the carpet covering the sidewalk, Silberman’s affidavit and report fail to raise an issue of fact as to whether the condition of the landing deviated from the industry custom or practice allegedly represented by ASTM Standard F1637.

Accordingly, defendant’s motion for summary judgment is granted and plaintiff’s complaint is hereby dismissed. This constitutes the decision and order of the court.

DATE :

8/10/16


KERN, CYNTHIA S., JSCHON. CYNTHIA S. KERN
J.S.C.