

Cruz v Perspolis Realty LLC
2017 NY Slip Op 31019(U)
May 15, 2017
Supreme Court, New York County
Docket Number: 162414/2014
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

YOLANDA CRUZ,

Plaintiff,

-against-

PERSPOLIS REALTY LLC and ALMA REALTY
CORP.,

Defendants.

Index No.: 162414/2014

DECISION/ORDER

Motion Seq. 001

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations	
Annexed	1
Answering Affidavits/Affirmations	2

ERIKA M. EDWARDS, J.:

Defendants Perspolis Realty LLC’s (owner) and Alma Realty Corp.’s (managing agent) (collectively “Defendants”) motion for summary judgment dismissal of Plaintiff Yolanda Cruz’ (“Plaintiff”) complaint against Defendants for injuries she sustained when she slipped and fell on spilled ice cream while walking down the stairs in her building is GRANTED and Plaintiff’s complaint is dismissed against both Defendants.

Defendants demonstrated their entitlement to summary judgment as a matter of law as there was no evidence that Defendants caused or created a defective condition, that they had actual or constructive notice of a defective condition or that they breached a duty of care to Plaintiff.

Here, discovery is complete and Plaintiff filed a note of issue. In her bill of particulars, Plaintiff alleged in substance that she was caused to slip and fall on a defective condition

involving the presence of debris and/or a foreign substance on the steps and, more specifically, trash and melted ice cream which caused the steps to become sticky and slippery. Plaintiff testified in substance that on September 12, 2014, at approximately 5:50 p.m., she slipped and fell when she stepped on melted ice cream that had been spilled from a cup while she was walking down the steps of her building. She testified that she observed the cup of ice cream standing upright on the side of the steps earlier that day at about 3:00 p.m. when she was walking up the steps after coming home from work. Plaintiff further stated that she did not know who placed the cup of ice cream on the steps; she did not move it; she did not notify the superintendent or anyone else about the cup of ice cream; and she was not aware of anyone else making a complaint about the cup of ice cream.

The building superintendent testified in substance that he usually cleans the staircase once every morning and he inspects it several times throughout the day, including checking the area at some time between 2:00 p.m. and 4:30 p.m. before he leaves for the day at 5:00 p.m. He does not recall what time he cleaned or inspected the area on the date of the accident, but he did not see the cup or any ice cream on the steps. Additionally, tenants are provided his cell phone number to report any maintenance issues, but he did not receive any reports or complaints about the cup or ice cream on the steps prior to the accident.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46

NY2d 1065, 1067-68 [1979]). The movant's initial 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*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

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 defendants' employees to discover

and remedy it to correct or warn about its existence (*Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Additionally, neither a general awareness that litter or some other dangerous condition may be present, nor the fact that Plaintiff observed the cup with ice cream on another portion of the steps prior to the accident is sufficient to create constructive notice (*id.* at 838 [internal citations omitted]).

In applying these legal principles to the facts in the instant matter, based on the admissible evidence submitted, the court finds that Defendants demonstrated that they did not create or have actual or constructive notice of the alleged defective condition prior to Plaintiff's accident.

Here, Plaintiff opposes the motion and argues in substance that Defendants failed to meet their burden of demonstrating that they did not have constructive notice of the defective condition because the cup with ice cream was present on the steps since at least 3:00 p.m., when Plaintiff observed it, until 5:50 p.m., when Plaintiff slipped and fell. Additionally, Plaintiff argues that since Plaintiff observed the cup of ice cream almost three hours earlier and the ice cream had melted, Defendants had constructive notice of the defective condition. However, based on Plaintiff's testimony, the alleged defective condition which caused her to slip and fall was the melted ice cream which had spilled out of the cup onto the steps and not the upright cup containing ice cream which Plaintiff had seen intact on the side of the steps earlier in the day. Therefore, at the time of the accident, the cup had been moved and the ice cream had spilled out onto the steps, which allegedly created a dangerous condition causing Plaintiff's slip and fall. There is no evidence that anyone observed the alleged defective condition of the spilled, melted ice cream prior to Plaintiff's accident so as to permit discovery and removal by Defendants.

Additionally, even though the ice cream melted, this in and of itself does not create a question of fact as to the length of time that the spill was present on the steps, since ice cream melts rapidly inside of a building and could have occurred just moments before the accident. The court is not persuaded by Plaintiff's remaining arguments.

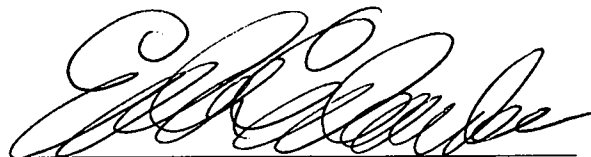
As such, Plaintiff failed to raise any issues of material fact to demonstrate that Defendants had actual or constructive notice of the alleged defective condition and Defendant's motion for summary judgment is granted.

Accordingly, it is hereby

ORDERED that Defendants Perspolis Realty LLC's and Alma Realty Corp.'s motion for summary judgment in its favor as against Plaintiff Yolanda Cruz is granted, Plaintiff's complaint is dismissed against Defendants with prejudice and without costs and the Clerk is directed to enter judgment accordingly in favor of Defendants as against Plaintiff.

This constitutes the decision and order of the court.

Date: May 15, 2017



HON. ERIKA M. EDWARDS