Vederosa v County of Suffolk
2017 NY Slip Op 31681(U)
August 11, 2017
Supreme Court, Suffolk County
Docket Number: 11-19788
Judge: Daniel Martin
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SHORT FORM ORDER

INDEX No. 11-19788

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 1-31-17
ADJ. DATE 4-25-17
Mot. Seq. # 005 - MG

Mot. Seq. # 006 - MG; CASEDISP

SALVATORE VEDEROSA and LINDA VEDEROSA,

Plaintiffs,

- against -

COUNTY OF SUFFOLK, TOWN OF BROOKHAVEN, and ARCHITECTURAL ENTRANCE SYSTEMS, INC.,

Defendants.

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14, 15 - 34 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 35 - 38; 39 - 40 ; Replying Affidavits and supporting papers 41 - 42; 43 - 44 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by defendants County of Suffolk and Architectural Entrance Systems, Inc., are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant County of Suffolk for summary judgment in its favor dismissing the complaint is granted; and it is further

ORDERED that the motion by defendant Architectural Entrance Systems, Inc., for summary judgment in its favor dismissing the complaint is granted.

Plaintiff, Salvatore Vederosa, commenced this action to recover for personal injuries he allegedly incurred while opening the door of the Sixth District Court located at 150 Main Street in Patchogue, New York. Plaintiff alleges that on September 23, 2010, he was entering the courthouse and the "entry door was caused to be violently flung open." He alleges, inter alia, negligence on behalf of the County of Suffolk, the owner of the building, and negligence on behalf of Architectural Entrance Systems, Inc., who installed and maintained the door. Plaintiff's wife, Linda Vederosa, alleges she was deprived of the services and companionship of her husband due to defendants' negligence. Issue has been joined, discovery is complete and a note of issue has been filed. Defendant Town of Brookhaven was granted summary judgment by order of this Court, dated December 14, 2014, pursuant to CPLR 3212 dismissing the complaint as asserted against it, on the grounds that it did not own, possess, maintain or control the subject courthouse.

Defendant County of Suffolk now moves for summary judgment pursuant to CPLR 3212 on the grounds that the harm that caused plaintiff's injuries was not foreseeable, and therefore, the County of Suffolk owed no duty to plaintiff. In support of the motion the County of Suffolk submits, among other things, a copy of the pleadings, the transcript of plaintiff's 50-h hearing, the deposition transcripts of plaintiff, Donald Falzon, Robert Frevele, Raymond Warnken, Jr., and the expert affidavit of James J. Bernitt.

Defendant Architectural Entrance Systems, Inc. (hereinafter "AES") moves for summary judgment pursuant to CPLR 3212 on the grounds it was not negligent, owed no duty to plaintiff, did not breach any duty, did not have actual or constructive notice of any defective condition, and did not create the alleged condition. In support of the motion AES submits a copy of the pleadings, photographs of the door, its contract with the County of Suffolk, various work orders, e-mails and log book pages, the transcript of plaintiff's deposition, the deposition transcripts of Donald Falzon, Robert Frevele, Raymond Warnken, Jr., and the expert affidavit of Thomas Pienciak.

In opposition to both motions, plaintiff submits an affirmation of counsel, an e-mail dated November 4, 2010, and the log book maintained by the Suffolk County Department of Public Works.

Plaintiff testified at his deposition that on September 23, 2010, between 9:30 a.m. and 11:00 a. m., he attempted to enter the Sixth District Courthouse located in Patchogue, New York. He testified that as he approached the doors, he noticed someone in the middle vestibule area between the entrance door and the interior entrance door. Plaintiff testified that as he put his hand on the outside entrance door handle, " a big suction tunnel came" because the person who was located between the entrance door and the second door also opened the interior door and the two doors created "a suction" effect. He testified he pulled on the door "normal," the exterior door was heavy and just took his whole hand and trapped it between the exterior brick wall and the door. Plaintiff testified the back part of his knuckles on his right hand had abrasions. Plaintiff testified his injury "could have been from the wall, and it could have been when [he]

was pulling it out from the metal."

Donald Falzon testified he is the owner of AES and his business sells and services automatic swing doors and revolving doors including handicapped accessible doors. He testified AES has a contract with the County of Suffolk to provide on-call service for automatic door repairs. Falzon testified that AES did not install the doors at the Sixth District Courthouse, but installed automatic operators to make the doors handicap accessible on an automatic basis. He testified that after the doors were automated they would be adjusted so the door would not hit the wall when it was opened manually or by using the handicap push plate. Falzon testified that the subject door was automated in such a way that the door and the handle would not hit the wall and after the door was operating properly the County of Suffolk signed off on the work performed. Falzon testified that AES was never notified, prior to September 23, 2010, that the door or its handle came into contact with the wall, that he never received any complaints about the door and AES was not contacted prior to September 23, 2010 to perform work on the subject door.

Robert Frevele testified that he is the assistant director of the Department of Public Works, Division of Operation and Maintenance for the County of Suffolk. Frevele testified that in 2010 he was the Sixth District Courthouse's building superintendent, and that the building is owned by the County of Suffolk. He testified that from the date of installation of automatic operators, AES did not perform work or repairs on the subject doors. He testified that on September 30, 2010, someone from the County installed a doorstopper. Frevele testified that prior to September 23, 2010, no one made any complaints about the door, there were no prior accidents and a County employee would inspect the premises on a monthly basis.

Raymond Warnken, Jr. testified that he is employed by the Suffolk County Department of Public Works, and that he has maintained the Sixth District Courthouse for 24 years. He testified the door handles were installed at least 15 years ago and were never changed prior to September 23, 2010. Warnken testified that there was no rubber stopper or any other device on the brick wall that would come into contact with the door handle prior to September 23, 2010, and that he installed the rubber stopper a few days after the incident. Warnken testified that he never saw the entrance door handle or the door ever come in contact with the brick wall. He testified after the incident he tested the door, both manually and using the handicap push plate, and the door opened normally. He testified he tested the door numerous times and it did not come into contact with the brick wall. Warnken testified that four to five hundred people use the door per week and there were no prior complaints or accidents involving the subject door.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mars., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, *citing* ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). A landowner has a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). The scope of the duty requires an evaluation of the foreseeablilty of the injury (***Lynch v Sports, Leisure & Entertainment RPG***, 71 AD3d 641, 896 NYS2d 413 [2d Dept 2010]). However, a landowner has no duty to protect or warn against conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses (*see* ***Mather v A.J. Richard & Sons***, 84 AD3d 1038, 1039, 923 NYS2d 218 [2d Dept 2011]; ***Tyz v First St. Holding Co., Inc.***, 78 AD3d 818, 910 NYS 2d 179 [2d Dept 2010]). To impose liability upon a landowner defendant for plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that such condition was the proximate cause of the plaintiff's injuries (***Olsen v Town of Richfield***, 81 NY2d 1024, 599 NYS2d 912 [1989]).

A defendant moving for summary judgment has the initial burden of making a prima facie showing 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 (*see* ***Arzola v Boston Props. Ltd. Partnership***, 63 AD3d 655, 656, 880 NYS2d 352 [2d Dept 2009]).

Both the County of Suffolk and AES have established prima facie entitlement to summary judgment dismissing the complaint against them. The County of Suffolk has established, based upon the testimony of Donald Falzon, that after installation of the handicap plate the door handle did not touch the brick wall upon opening, and that the door operator, which controls the swing range of the door, both in manual and automatic modes, would stop the door from swinging past a certain point. Robert Frevele testified that the courthouse property was inspected on a monthly basis, and that prior to September 23, 2010 there were no complaints regarding the subject door. Frevele testified that immediately after the accident he inspected the door and it was working properly. Raymond Warnken also testified that the courthouse was inspected weekly, and that there were no problems with the door. The County of Suffolk's expert, James Bernitt, also inspected the door, and avers that it operated in an appropriate manner. Bernitt avers that no "air pressure"effect was found when opening the interior door and the exterior door simultaneously. He avers the manual operation of the door "encountered drag due to the inherent mechanism." He opines that the door was "operating in a safe condition in all modes of operation," and "simultaneous opening of the inside door had no effect on the operation (of the exterior door)." The Court notes Bernitt's inspection took place on October 18, 2016, more than six years after the incident.

AES installed the swing operators on January 22, 2009, and the work and invoice were approved by the County of Suffolk. AES has established that after installation it did not perform any work on the subject doors, and that, based upon the testimony of Donald Falzon, it never received any complaints about the door hitting the brick wall, that AES's contract was an on-call contract to perform repairs when called, and that AES was not contacted prior to September 23, 2010. Additionally, AES's expert, Thomas Pienciak opines

that "AES's installation of the automatic operator did not cause the door to hit the brick wall," and that, within the bounds of reasonable architectural and technical certainty," there is no evidence that AES violated the standard of care for automatic door service companies in the performance of work under its contract with the County of Suffolk. Pienciak concludes that AES was not negligent in the installation of the motorized operator that occurred over a year prior to the accident and that AES did not contribute to or cause plaintiff's injuries.

In opposition, plaintiff relies on an e-mail and a log book which "contain statements that are inconsistent with defendants' testimony." However, both the e-mail and the log book are not in admissible form (*see* CPLR 4518; ***People v Kennedy***, 68 NY2d 569, 510 NYS2d 853 [1986]). In any event, even considering the documents, they establish that the County of Suffolk did not have constructive or actual notice of any dangerous condition prior to September 23, 2010. Moreover, the maintenance records establish that AES did not service the subject door after installation of the automatic door operators. The record contains no evidence that AES created an unreasonable risk of harm or increased a risk of harm when it installed the automatic door operators (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002]). Both the County of Suffolk and AES have established prima facie entitlement to summary judgment as they did not created the alleged dangerous condition, and did not have actual or constructive notice of any such condition. This is especially so where there were no prior complaints or accidents regarding the door used by hundreds of individuals weekly. Plaintiff has failed to raise a triable issue of fact. Accordingly, the motions by defendants County of Suffolk and AES are granted.

Dated: August 11, 2017

A.J.S.C.

X FINAL DISPOSITION ____ NON-FINAL DISPOSITION