Roque v Verdesoto
2017 NY Slip Op 32217(U)
October 6, 2017
Supreme Court, Queens County
Docket Number: 1342/15
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

MARIA MERCEDES ROQUE,

Plaintiff,

-against-

JORGE VERDESOTO and THE CITY OF NEW YORK,

Defendants.

Index No. 1342/15

Motion Date August 22, 2017

Motion Cal. No. 155

Motion Seq. No. 3

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Upon the foregoing papers it is ordered that this motion by defendant, Jorge Verdesoto for an order granting leave to renew/reargue the decision/order of this Court dated May 1, 2017, and upon the granting of renewal/reargument granting defendant, Jorge Verdesoto for summary judgment dismissing the Complaint and any all cross claims as against him pursuant to CPLR 3212 is hereby decided as follows:

In a decision/order dated May 1, 2017, this Court held in relevant part:

> Upon the foregoing papers it is ordered that this motion by defendant, Jorge Verdesoto for summary judgment dismissing the plaintiff's Complaint and any and all cross-claims as against him pursuant to CPLR 3212 is hereby denied as untimely.
>
> The record reflects that the Note of Issue was filed on September 1, 2016. In the absence of a court order or rule

> to the contrary, CPLR 3212(a) requires summary judgment motions to "be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Filannino v Tribrough Bridge and Tunnel Authority*, 34 AD3d 280 [2006]). In *Brill v. City of New York*, the Court of Appeals held that: "'good cause' in CPLR 3212(a) requires a showing of good cause for making the delay in the motion - - a satisfactory explanation for the untimeliness - - rather than simply permitting meritorious, non judicial findings, however tardy." The instant motion was served on January 3, 2017.
>
> Plaintiff, in her reply papers, concedes that the instant summary judgment motion is untimely by several days, yet fails to proffer any reason whatsoever for such untimeliness. Her counsel asserts that an Amended Notice of Motion and Amended Affirmation in support have been filed articulating the foundation of "good cause" however, no such papers are in the record before this Court (or in the Court file). As such, there has been no showing of "good cause."
>
> Accordingly, the motion is denied as untimely made without leave of the court upon good cause shown (*see Brill v City of New York*, *supra*).

Defendant Verdesoto now seeks renewal/reargument of the prior motion and submits a copy of the Amended Notice of Motion which he maintains he previously tried to submit in the CMP Part for the prior motion but it was rejected there as the Referee in CMP maintained that an opposition had already been served. In the Amended Notice of Motion, movant asserts that: "Your affirmant's office closed early for the New Year on Friday, December 30, 2017. Your affirmant's office was closed in observance of the New Year Holiday on Monday, January 2, 2017.

The within motion was filed on the first business day thereafter, on Tuesday, January 3, 2017."

The Court finds that good cause has been shown and upon reargument the Court finds as follows:

This is a personal injury action whereby on April 11, 2014, plaintiff, Maria Mercedes Roque allegedly tripped and fell on the sidewalk adjacent to the premises located at 1817 Menahan Street, Ridgeweood, New York due to the negligence of defendants. Plaintiff maintains that he sustained serious personal injuries.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and

remedy it (*see, id.*).

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (*see, Gordon v. Muchnick*, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability (*Id.; see also, Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et. al.*, 1 AD3d 578 [2d Dept 2003]).

Moving defendant, Jorge Verdesoto presented a prima facie case that there are no triable issues of fact. Moving defendant established that he is not liable for the alleged injuries because while Administrative Code §7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk, the statute specifically exempts owners of one, two or three family residential real property that is in whole or in part, owner occupied, and used exclusively for residential purposes (*Coogan v. City of New York*, 73 AD3d 613 [1st Dept 2010]). Moving defendant established via, inter alia, photographs of the subject accident site, and the examination before trial transcript testimony and affidavit of moving defendant, Jorge Verdesoto himself that he owned and occupied the abutting two-family home which was used exclusively for residential purposes. As moving defendant demonstrated that the exemption is applicable here, the moving defendant was under no duty to maintain the sidewalk abutting his premises. Additionally, movant established that he neither caused nor created an unsafe condition (*see, Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]), nor derived a special use from the subject sidewalk. Accordingly, defendant Verdesoto established a prima facie case.

In opposition, plaintiff and co-defendant presented triable issues of fact. Plaintiff and co-defendant presented, inter alia, plaintiff's own 50-h hearing transcript testimony and copies of photographs of the subject accident site. It is well-established law that photographs accurately depicting the area in which a plaintiff fell generally create an issue of fact as to whether a premises owner had constructive notice of a defect which caused a trip and fall which is best submitted to the jury (*Zavarro v. Westbury Property Inv. Co.*, 244 AD2d 547 [2d Dept 1997]). Additionally, the issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v. County of Suffolk*, 90 NY2d 976 [1997]).

Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether moving defendant had either actual or constructive notice of a defective condition, and whether moving defendant acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, moving defendant's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: October 6, 2017

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Howard G. Lane, J.S.C.