

Kontorinakis v 27-10 30th Realty LLC

2017 NY Slip Op 32863(U)

October 12, 2017

Supreme Court, Queens County

Docket Number: 14611/2014

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

MARIA KONTORINAKIS, as the
Administrator of the Estate of
Theodore Zervos,

Index No.: 14611/2014

Motion Date: 10/12/17

Plaintiff,

Motion No.: 70

- against -

Motion Seq.: 2

27-10 30th REALTY LLC and SW
MANAGEMENT LLC,

Defendants.

- - - - - x

The following papers numbered 1 to 11 read on this motion by
defendants for an order pursuant to CPLR 3212, granting summary
judgment in favor of defedants and dismissing the complaint:

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Affirmation in Opposition-Affidavit-Exhibits.....	5 - 8
Reply Affirmation-Exhibits.....	9 - 11

This is an action to recover damages for personal injuries
allegedly sustained by plaintiff's father, Theodore Zervos, on
August 31, 2014 as a result of a trip and fall at defendants'
premises located at 27-10 30th Avenue, in Queens County, New
York. Defendant 27-10 30th Realty LLC owned the subject premises
and defendant S.W. Management LLC was the managing agent.

This action was commenced on September 23, 2014 by filing a
summons and verified complaint. Defendants joined issue by
service of a verified answer dated December 2, 2014. On February
20, 2015, Mr. Zervos passed away from unrelated causes. Mr.
Zervos was never deposed in this action. Mr. Zervos' daughter,
Maria Kontorinakis, was substituted as plaintiff/administrator by
Short Form Order dated March 11, 2016. Defendants now move for
summary judgment on the ground that plaintiff cannot establish
what proximately caused the fall.

In support of the motion, defendant submits an affirmation from counsel, Jeffrey D. Fippinger, Esq.; a copy of the pleadings; a copy of the Order appointing Maria Kontorinakis as Administrator; a copy of the Note of Issue; a copy of the verified bill of particulars; a copy of the preliminary conference order; a copy of the response to discovery demands; a copy of the transcript of the examination before trial of plaintiff taken on January 18, 2017; copies of photographs marked at the deposition; and a copy of the transcript of the examination before trial of Bogdan Kosieradzki taken on March 24, 2017.

At her deposition, plaintiff testified that she learned of the incident when she received a telephone call from the hospital. Somebody called from the emergency room and told her that her father tripped and fell at a certain point near the hospital. She visited her father in the emergency room. While in the hospital, her father told her that he was walking home alone when his foot fell in because a particular spot was broken, raised and not straight. After her father returned home from the hospital, he took her and her brother to the location where he fell. He showed them the location and told them that the pavement was raised. They did not take any photographs during that visit. Approximately two and a half weeks later, she returned to the location with an attorney. She showed the attorney what her father had shown her. The attorney took photographs at that time.

Bogdan Kosieradzki was deposed on behalf of defendants. He testified that he had been employed as the property manager for the subject premises for twelve years. He performed visual inspection of the sidewalk once every week or ten days. He never received any complaints about the sidewalk abutting the subject premises.

Based on plaintiff's deposition testimony, defendants' counsel contends that plaintiff cannot establish what proximately caused the fall as there is no credible proof, only hearsay, as to the cause of the incident. Thus, counsel contends that defendants are entitled to judgment as a matter of law.

In opposition, plaintiff submits an affidavit dated September 25, 2017. She affirms that on the date of the accident, she received a call from the Mount Sinai Queens Emergency Room around 10:15 a.m. She was told that her father had just arrived at the emergency room after tripping and falling on a sidewalk near the hospital. She arrived at the hospital about fifteen minutes after receiving the call. When she got to her father, he was lying in the emergency room bed with bandages over his right

eye and blood on his face. He was crying, yelling that he was in pain, and upset. She asked him what happened. Her father said that he was walking along 30th Avenue when he tripped and fell over a raised portion of the sidewalk next to the wall in front of the Chelsea apartment building garage next to Mount Sinai Hospital. Her father told her that when he fell he hit the right side of his face against the wall next to the raised portion of the sidewalk. She left the emergency room and went to the location her father described. She saw that there was a raised portion of the sidewalk next to a small outer wall in front of 27-10 30th Avenue. She saw what looked like blood on the sidewalk in the area of the raised sidewalk. After her father was released from the hospital, he took her and her brother to the subject location. Her father pointed to and told her and her brother that the raised portion of the sidewalk was where he had tripped. That raised portion was also where she had seen the blood.

Based on the testimony and plaintiff's affidavit, counsel for plaintiff, James R. Baez, Esq., contends that plaintiff's statements confirm the location of the incident and the subject defect which caused the fall. Counsel argues that the statements made by Mr. Zervos to plaintiff are admissible as excited utterances since Mr. Zervos made the statements in the emergency room while he was visibly upset. Counsel further contends that the verified bill of particulars and response to combined demands support plaintiff's description of the subject incident and location. Lastly, counsel argues that defendants have not contested that they had constructive notice of the subject defect.

A movant for summary judgment must make a prima facie showing of entitlement by demonstrating that there are no material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). A defendant can establish prima facie entitlement to summary judgment with evidence that plaintiff cannot establish what proximately caused the fall (see Knudsen v Mamaroneck Post No. 90, Dept. of N.Y.-Am. Legion, Inc., 94 AD3d 1058 [2d Dept. 2012]; Yefet v Shalmoni, 81 AD3d 637 [2d Dept. 2011]; Martone v Shields, 71 AD3d 840 [2d Dept. 2010]). Once the movant satisfies this burden, then the burden shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see Zuckerman v City of N.Y., 49 NY2d 557 [1980]).

Since Mr. Zervos' testimony was not preserved and plaintiff did not witness the incident, there is no evidence identifying any defect or unsafe condition which caused the subject incident. Thus, defendants met their initial prima facie burden of demonstrating that plaintiff cannot establish the proximate cause

of the incident (see Aguilar v Anthony, 80 AD3d 544 [2d Dept. 2011]; DiLorenzo v S.I.J. Realty Co., LLC, 115 AD3d 701 [2d Dept. 2014]; Denicola v Costello, 44 AD3d 990 [2d Dept. 2007])). Moreover, although plaintiff contends that Mr. Zervos fell due to a defective condition on the sidewalk, it is just as likely that the incident was caused by some other factor, such as a misstep or loss of balance (see Manning v 6638 18th Ave. Realty Corp., 28 AD3d 434 [2d Dept. 2006]). As such, any determination by the trier of fact as to the cause of the incident would be based upon impermissible speculation (see Christopher v New York City Tr. Auth., 300 AD2d 336 [2d Dept. 2002]; Brown-Phifer v Cross County Mall Multiplex, 282 AD2d 564 [2d Dept. 2001] ["Since a jury would be required to speculate as to the cause of the plaintiff's fall, summary judgment should have been granted"]; Teplitskaya v 3096 Owners Corp., 289 AD2d 477 [2d Dept. 2001])).

In opposition, plaintiff failed to raise a material issue of fact. The statements made by Mr. Zervos to plaintiff are hearsay and inadmissible. To be classified as an excited utterance, the statements must be made before there was "time to contrive and misrepresent" (see People v Brown, 70 NY2d 513, 518 [1987] [internal quotation marks omitted]). Here, there was no showing that the statements were made under the stress of excitement caused by the incident. Plaintiff's affidavit fails to indicate approximately how long after the incident Mr. Zervos described the location of his fall. Moreover, the statements were brought on by plaintiff's own inquiry, thus, decreasing their spontaneity. In any event the description of the location given by Mr. Zervos to his daughter only indicates a general location and not a specific defect. Although plaintiff testified that she visited the site with Mr. Zervos and brother sometime after Mr. Zervos was released from the hospital, such identification of the site is insufficient to raise a triable issue of fact because there is no admissible evidence establishing that the condition at the time of Mr. Zervos' fall was substantially the same as it was on the day plaintiff visited the site (see Rios v New York City Housing Auth., 48 AD3d 661 [2d Dept. 2008]; Rivera v New York City Tr. Auth., 22 AD3d 554 [2d Dept. 2005]). Similarly, plaintiff's statement that she saw blood on the sidewalk in the same location that her father pointed out as the site of the incident is merely speculative and insufficient to raise a triable issue of fact.

As plaintiff has failed present admissible evidence identifying the defect or unsafe condition which caused Mr. Zervos to trip and fall, it is unnecessary to examine the expert affidavit submitted in opposition.

Accordingly, and based on the above reasons, it is hereby,

ORDERED, that the motion for summary judgment by defendants 27-10 30th REALTY LLC and SW MANAGEMENT LLC is granted, plaintiff's complaint is dismissed, and the Clerk of the Court shall enter judgment accordingly.

Dated: October _____, 2017
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.0