

Kozik v Sherland & Farrington, Inc.

2017 NY Slip Op 33192(U)

August 30, 2017

Supreme Court, Nassau County

Docket Number: 600793-13

Judge: Jerome C. Murphy

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Closed to E-File

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

CLOSED TO E-FILING

HALINA KOZIK,

Plaintiff,

- against -

SHERLAND & FARRINGTON, INC. and
SPECTOR GROUP HOME, LLC,

Defendants.

TRIAL/IAS PART 18
Index No.: 600793-13
Motion Date: 6/26/17
Sequence No.: 003
MD
DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....	1
Affirmation in Opposition and Exhibit.....	2
Reply Affirmation.....	3

PRELIMINARY STATEMENT

Defendant, Sherland & Farrington, Inc. (simply referred to herein after as "Sherland"), brings this application for an Order pursuant to CPLR § 3212 dismissing the plaintiff's complaint herein, and all cross-claims, and directing that summary judgment be entered in favor of defendant, Sherland & Farrington, Inc., on the grounds that as to said defendant the plaintiff's cause of action has no merit under New York State, and for such other and further relief as to this Court may deem just and proper, together with the costs of this motion. Plaintiff has submitted opposition to this application.

[* 2]

BACKGROUND

This action arises out of a slip and fall accident that occurred on May 5, 2010 at approximately 5:15 p.m. at Pall Corporation (where the plaintiff worked) located at 25 Harbor Park Drive, Port Washington, New York. Specifically, according to the plaintiff, the accident occurred “on the most recently installed floor as part of an addition to said structure” (Verified Bill of Particulars, ¶¶4-5). It is undisputed herein that while the premises were owned by plaintiff’s employer, Pall Corporation, they were managed and maintained by the defendants herein.

As against Sherland, the plaintiff claims, *inter alia*, that it was reckless and negligent in the construction and installation of the floor that the plaintiff was walking on at the time of the accident. The plaintiff submits that the defendants’ construction and installation of the floor did not adhere to/meet the applicable standards creating the “wavy” condition upon which the plaintiff fell. Specifically, at her oral examination before trial, the plaintiff testified that the bottom of the front of her right foot got caught on the floor, causing her knee to twist. She did not fall to the floor. According to the plaintiff, the floor was “wavy” where the accident occurred. She added that after the accident, she looked back to see if anything else could have caused the accident except for the “waviness.”

Upon the instant motion, defendant, Sherland, asserts three principal bases for its entitlement to summary judgment. One, the plaintiff did not observe the specific alleged defect that caused her to fall; nor does she have any idea as to where she fell. Two, the defendant’s expert affidavit reveals no defect in the hallway in question. And, lastly, if there was any defect, it was trivial and therefore non-actionable.

DISCUSSION

The law is settled. Summary judgment is the “procedural equivalent of a trial” (*Falk v. Goodman*, 7 NY2d 87, 91 [1959]), and, as such, it is a “drastic remedy” which should not be granted where there is any doubt as to the existence of a triable and “bona fide” issue of fact (*Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 [1978]). It is only when the movant has made a *prima facie* showing which demonstrates that summary judgment is warranted, does the burden then shift to the opposing party to show by evidentiary facts that a claim is real and can be established at trial (*Zuckerman v. City of New York*, 49 NY2d 557, 562–563 [1980]; *Indig v. Finkelstein*, 23 NY2d 728 [1968]). Ultimately, the purpose of the motion is to sift out evidentiary facts and determine from them whether an issue of fact exists (*Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 NY2d 178 [1994]). As such, “[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party” (*Stukas v. Streiter*, 83 AD3d 18, 22 [2nd Dept. 2011]; *Pearson v. Dix McBride, LLC*, 63 AD3d 895 [2nd Dept. 2009]).

It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances (*Basso v. Miller*, 40 NY2d 233, 241 [1976]). Thus, for a landowner to be liable to a person on the land for an injury caused by a condition on the land, the plaintiff must establish three basic elements (aside from causation and injury): a dangerous condition existed on the land; the owner created or had notice of the condition; and the owner failed to take reasonable measures to protect persons on the land from the condition. A plaintiff’s inability to identify the cause of a fall may be fatal to a premises liability cause of action, because in these circumstances, a finding that the defendant’s negligence proximately caused the plaintiff’s injuries would be based on speculation (*Rivera v. 916 Peekskill Main Realty, Inc.*, 147

AD3d 802 [2nd Dept. 2017]).

However, the mere fact that a dangerous condition exists on a piece of property does not automatically make the owner liable for injury caused by the condition. A property owner is not an insurer of the safety of those on the land (*Barnaby v. Rice*, 75 AD2d 179 [3rd Dept. 1980], *aff'd on opinion below*, 53 NY2d 720 [1981]). Thus, in light of the owner's duty to exercise only reasonable care, liability normally attaches only where the owner had actual or constructive notice of the dangerous condition (*Buckley v. Sun & Surf Beach Club*, 95 NY2d 914 [2000]; *Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994])

In support of its motion for summary judgment herein, the defendant submits, *inter alia*, the expert affidavit of Joseph Schmitt, P.E., a licensed engineer in the State of New York, who states, in pertinent part, as follows:

8. A visual inspection [of the subject corridor] revealed some very slight irregularities in the surface, essentially a slight waviness. The degree of waviness was measured using a 9 inch level and a vernier caliper. The differential from high point to low point was measured at .175 inches. The measurement was taken over at least 3 feet of the corridor, and the .175 was the maximum deviation.

10. The maximum deviation includes a slope of the wave (of the floor) of 2%. The standard for a handicap ramp by comparison is 8 percent. The floor in question therefore had a much more gradual slope than a perfectly acceptable handicap ramp (i.e., a ramp that would be up to code and not violating any safety standards).

11. The floor in question was all smooth and consisted of no sharp angles or edges. The slope was gradual at all points.

12. The above comments are with a reasonable amount of engineering certainty.

13. Further, based my [sic] education, training, experience, inspection of the area, my knowledge of applicable standards and codes for inside floors, my experience in construction, and my review of applicable codes and standards, I can say with a

reasonable amount of engineering certainty that the floor in question violated no codes or standards for the community in question and that it in no way posed a hazard or was dangerous.

(Motion, Ex. C)

Based upon the defendant's submissions, including the foregoing expert report, this Court cannot find that the defendant/movant, Sherland, has met its *prima facie* entitlement to judgment as a matter of law herein. Specifically, this Court cannot find, based upon the defendant's expert's report, that there was no dangerous condition on the land; to the contrary, the defendant's proof confirms that the floor in the subject corridor where the plaintiff fell was in fact "wavy"— the condition that caused plaintiff's fall.

The defendant's expert's attempts to equate the waviness of the hallway with a degree of slope to be found on an acceptable handicap ramp is unavailing. This is particularly so in this case where the plaintiff had clearly charged the movant herein with violating the floor flatness requirement required in constructing concrete floors and slabs.

In addition, the defendant's failure to address— let alone establish— that it did not have actual or constructive notice of the dangerous condition also precludes a finding of judgment as a matter of law on the plaintiff's slip and fall claim.

As to the defendant's claim that the wavy floor was a trivial defect and was not "wavy" enough to be actionable, such argument is also without any merit. "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" (*Hutchinson v. Sheridan Hill House Corp.*, 26

NY3d 66 [2015]). The defendant has failed to do so herein. Specifically, the defendant's expert's statements – including and particularly his statement that “[a] visual inspection [of the subject corridor] revealed some very slight irregularities in the surface” and his attempts to equate the slope of the wave of the floor to a handicap ramp preclude a finding on this record that the alleged defect was trivial (*Ryan v. KRT Prop. Holdings, LLC*, 45 AD3d 663, 665 [2nd Dept. 2007] [internal quotation marks omitted]).

Since the defendant did not meet its initial burden herein, this Court need not review the sufficiency of the plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Khamis v. CG Foods, Inc.*, 49 AD3d 606, 607 [2nd Dept. 2008]).

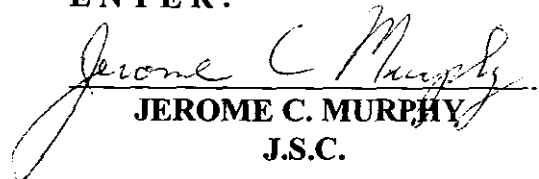
The parties' remaining contentions have been considered and do not warrant discussion.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
August 30, 2017

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

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