

<b>Guziewicz v Marriott Intl., Inc.</b>
2018 NY Slip Op 30136(U)
January 23, 2018
Supreme Court, New York County
Docket Number: 153671/15
Judge: Lynn R. Kotler
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

KATHLEEN GUZIEWICZ and MICHAEL GUZIEWICZ

INDEX NO. 153671/15

- v -

MOT. DATE

MOT. SEQ. NO. 003

MARRIOTT INTERATIONAL, INC. et al.

The following papers were read on this motion to/for <u>summary judgment and x-mot for spoliation</u>	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). <u>35-58</u>
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). <u>65-76</u>
Replying Affidavits	NYSCEF DOC No(s). <u>81, 82</u>

This is a personal injury action wherein plaintiffs seek to recover for injuries sustained when plaintiff Kathleen Guziewicz ("Guziewicz") backed up and fell over a fire hydrant and two guard poles on a sidewalk in front of a hotel. Plaintiff claims that she was forced to back up when defendants' employee pushed a luggage cart towards her.

Defendants now move for summary judgment. Plaintiffs oppose the motion and cross-move for spoliation sanctions. Defendants oppose the cross-motion. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The facts are as follows. In September 2014, Guziewicz and her husband Michael Guziewicz stayed at defendant HMC Capital Resources Corp's ("HMC") hotel located at 85 West Street, New York, New York (the "hotel"). Defendant Marriott Hotel Services, Inc. ("Services") manages the hotel. Defendants claim that defendant Marriott International, Inc. ("Marriott") has no role in the ownership or management of the hotel.

The following facts are based upon the Guziewicz's deposition testimony. The accident occurred shortly after the plaintiffs had checked out of the hotel. Before they left their room, a bellman had come to plaintiffs' room and took their luggage down on a cart to the entrance of the building. After they had finished checking out, the plaintiffs exited the hotel and saw that their car had been brought around by the valet. Meanwhile, Guziewicz wanted to give the bellman a tip, but he gave the luggage cart to a captain outside the hotel and left before she could the bellman any money. Guziewicz had stayed at the hotel a number of times before, and was familiar with the captain. Guziewicz testified that her and her husband then headed towards the car, and the captain followed with the luggage cart.

Guziewicz testified at her deposition about the accident as follows.

Dated: 1/23/18

  
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HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED     NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED <sup>motion</sup>  DENIED <sup>cross-motion</sup>     GRANTED IN PART     OTHER

3. Check if appropriate:

SETTLE ORDER     SUBMIT ORDER     DO NOT POST

FIDUCIARY APPOINTMENT     REFERENCE

- Q. Okay. Did you change your location on the sidewalk?
- A. Yes, as the captain started down at me, to bring the luggage, he asked me to move, so he said, "Excuse me," and I moved to another position.
- Q. At that point, when he said, "Excuse me," where were you standing on the sidewalk?
- A. I was to – I was to the left.
- Q. With your back to the entrance to the hotel, you were to the left of the hotel entrance?
- A. Yes.
- Q. And when he said, "Excuse me," did you change your position?
- A. I backed up.
- Q. And how many steps did you back up?
- A. Two, one or two.  
...
- Q. Okay. What happened next?
- A. The gentleman said, again, "Excuse me." So I backed up again and then he said –
- Q. How many steps did you move backwards?
- A. Approximately one or two.
- Q. Before you moved backwards the first time, did you look to see what was behind you?
- A. No.
- Q. Before you moved back the second time, did you look behind you to see what was behind you?
- A. No.
- Q. Did something happen the second time you were walking backwards?
- A. No.
- Q. What happened after the second time you went back on or two steps?
- A. Well, the captain said, "Excuse me."
- Q. For a third time?

- A. For a third time. And I stepped like I was stepping back and away from where he was going, and he was at the car and he said, again, "Excuse me –"
- Q. Well, let me stop at the third "Excuse me."  
At the third "Excuse me," you, again, took a step backwards?
- A. Yes.
- Q. Did you look behind you before you stepped backwards?
- A. I did not.
- Q. And then after the third time you stepped backwards, what happened next?
- A. Well, he was at the car at the third time. Like he was there, the cart was at my car.
- Q. The cart was on the sidewalk?
- A. Yes, right at my car. So he said, again, "Excuse me," and I just looked at him like, you are already there, and as I stepped back on step, one-and-a-half step, I went over the pole, on to the fire plug on my back, and then fell on my left side.
- Q. The fourth time that you took – that he said, "Excuse me," you took one step backwards?
- A. Yes.
- Q. And did you look behind you before you took that step backwards?
- A. No, I didn't.

Defendants have also provided a transcript of a recorded telephone interview given by Guziewicz the day after the accident. In that statement, plaintiff acknowledged that her telephone conversation was being recorded. Guziewicz also gave a description of the accident, which is consistent with her deposition testimony.

In her sworn affidavit submitted in support of the cross-motion, Guziewicz expounds her claims. The doorman, whom Guziewicz refers to as "captain" is named Homero Comon ("Comon"). Guziewicz approached their car which had been brought to the front of the hotel. Once Guziewicz got to the passenger side of the car, she turned around to look for Comon. Guziewicz claims that she saw the luggage cart being moved through a crowd, but could not see Comon, because it was six feet high and taller than him. Guziewicz states that the luggage cart "was moving very quickly toward [her]." Guziewicz goes on to explain in her affidavit:

As he got closer to me, I heard him repeatedly exclaim "EXCUSE ME! EXCUSE ME! EXCUSE ME!" in rapid succession without verbally pausing or stopping his quick forward motion toward me with the cart or looking at me for my reaction. [] Comon was pushing the cart, which is taller than both of us, and I did not have eye contact with him. I was afraid I would be struck by the cart, so as quickly as I could, I continually stepped back as he repeatedly said "excuse me" and continually came toward me. I am 5-foot, 4 inches, and weighed approximately 250

pounds. Prior to this incident, I have had two mini-strokes, prior knee replacement and a laminectomy back surgery. I have type 2 diabetes and a thyroid condition. I was on disability prior to the incident. I'm not very mobile and cannot move or turn quickly.

When plaintiff stepped back, she "fell over the poles and hydrant behind [her], injuring [her] knees, [her] back and [her] left arm." At her deposition, plaintiff explained that she didn't observe the fire hydrant before her accident because it was approximately noon, and there were a lot of people on the sidewalk in front of the hotel.

In support of their motion, defendants argue that Marriott is an improper party and otherwise that the defendants are entitled to summary judgment because Guziewicz walked into an open and obvious condition. Defendants have provided photographs of the sidewalk in front of the hotel depicting the fire hydrant and guard poles which Guziewicz fell onto.

In opposition to the motion, plaintiffs argue that there is a question of fact as to whether plaintiff was presented with an "emergency situation" whereby plaintiff had mere seconds to decide whether to be struck by the luggage cart or "quickly retreat to a place of relative safety." Further, plaintiffs argue that defendants have not met their burden in showing that Guziewicz sustained her injuries solely because of her own conduct. Finally, plaintiffs maintain that their failure to produce video of the incident warrants spoliation sanctions.

On reply, defendants maintain that the "emergency situation" argument is a feigned issue of fact and that Guziewicz's affidavit contradicts her deposition testimony, as well as the recorded interview Guziewicz gave one day after the accident, and should be disregarded. As for spoliation sanctions, defendants maintain such relief is not warranted. They contend that their failure to preserve a video recording on the date of the accident is of no moment since it "undisputedly would not have depicted the area of the accident" and therefore, plaintiffs are not prejudiced by the failure to preserve same. Defendants point to the testimony of the hotel's loss prevention officer, Robert Callazo, who states that plaintiff's accident occurred outside the field of view of the camera in front of the hotel.

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Here, defendants' motion must be granted and the cross-motion denied. A condition is open and obvious when its "of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open" (*Soto v. 2780 Realty Co., LLC*, 114 AD3d 503 [1st Dept 2014] quoting *Westbrook v. WR Activities-Cabrera Mkts.*, 5 AD3d 69 [1st Dept 2004]). A finding that a condition is open and obvious as a matter of law, and that it was not inherently dangerous, warrants summary judgment in favor of a property owner (*Powers v. 31 E 31 LLC*, 123 AD3d 421 [1st Dept 2014]). Here, defendants have established that the fire hydrant and guard poles could not reasonably be overlooked by anyone with their

eyes open and observing the conditions on the sidewalk at the time of plaintiff's accident. Whether Guziewicz herself observed the fire hydrant and guard poles on prior occasions (a disputed issue of fact) is of no moment, since the reason why she didn't observe it prior to her accident was because she admittedly failed to turn around and look where she was going each time that she backed up. It is of no moment that plaintiff claims that the poles and hydrant "are only a few feet high and there were other people walking in the area that day which may have blocked any view of them" since this is mere conjecture and is otherwise insufficient to raise a triable issue of fact as to whether the hydrant and guard poles were open and obvious.

Nor is the court persuaded by Guziewicz's self-serving affidavit. At her deposition, Guziewicz clearly testified that the captain said excuse me four discrete times, and in between each time, she stepped backwards one or two steps without looking. Meanwhile, in her affidavit, Guziewicz claims that the captain yelled excuse me four times in a row, and only then did she step backwards to avoid being hit by the luggage cart. Guziewicz claims that she "had to choose, within a split-second" whether to back up or be hit by the luggage cart.

The court finds that Guziewicz's account of the events leading up to the accident in her affidavit is contradicted by her prior sworn deposition testimony and is therefore rejected. An affidavit which contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, "creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Telfeyan v. City of New York*, 40 AD3d 379 [1st Dept 2007] quoting *Harty v. Lenci*, 294 AD2d 296 [1st Dept 2002]). At her deposition, Guziewicz clearly testified that she took multiple steps backwards without looking over the course of the captain saying excuse me four separate times. Guziewicz's affidavit does not explain why her version of the events has changed. Based on Guziewicz's prior testimony, the only conclusion which a reasonable fact-finder could find on this record is that Guziewicz caused her accident by failing to turn around and observe the pole and hydrant before she backed up into it and fell. Therefore, defendants are entitled to summary judgment dismissing plaintiffs' complaint.

Finally, even if plaintiffs could demonstrate that the defendants willfully failed to preserve video recordings of the sidewalk in front of the hotel, there is no dispute that such video would not have shown the location of Guziewicz's accident, and therefore would not be probative. Accordingly, plaintiffs cannot demonstrate prejudice and spoliation sanctions are not warranted.

Based upon the foregoing, defendants' motion is granted and the cross-motion is denied.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that defendants' motion is granted and the cross-motion is denied; and it is further

**ORDERED** that plaintiff's complaint is dismissed; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

1/23/18  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.