

Allende v Parnosa Hotel Inc.
2018 NY Slip Op 31214(U)
June 14, 2018
Supreme Court, New York County
Docket Number: 162946/2015
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY -- PART 34

ROBYN ALLENDE,

Plaintiff,

Index No.: 162946/2015
Motion Sequence No.: 004

- against -

DECISION/ORDER

PARNOSA HOTEL INC.,

Defendant.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In this action to recover damages for personal injuries arising from a slip-and-fall accident, the defendant Parnosa Hotel Inc., moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint. The plaintiff opposes the motion.

Plaintiff, a tenant at the Parnosa Hotel,¹ alleges that she was injured on July 25, 2015, at approximately 2:30p.m.,² when she slipped and fell between the first and second floors of the interior staircase in the Parnosa Hotel. At her deposition, plaintiff testified that on that accident date, she was descending the stairs when she slipped on Chinese food (Plaintiff's dep at 18). Plaintiff testified that she first noticed the Chinese food on the stairs on July 24, 2015 when she was going up the stairs to use the communal restroom (*Id.* at 30). Plaintiff also testified that she informed the house cleaner Guillermina Montes Antonio (Montes) of the spilled Chinese food between 2:00p.m. and 3:00p.m. on July 24, 2015 (*Id.* at 18, 29-31). Further, plaintiff testified that Montes said she was aware of it and that she was going to take care of it (*Id.* at 18, 31).

¹ The Parnosa Hotel is a long term residential facility located at 529 West 144 Street, New York, New York.

² In plaintiff's affidavit sworn to on December 29, 2017, plaintiff attests that the accident occurred at approximately 2:30pm. The Court notes that plaintiff was not asked what time the accident occurred when she was deposed on June 15, 2017.

Defendant contends that this action must be dismissed because it did not cause or create the alleged dangerous condition on the stairs nor did it have actual or constructive notice of it. In support of its motion for summary judgment, defendant submits the pleadings, the transcript of the deposition testimony of the plaintiff and affidavits from Montes and Anna Mendez (Mendez), the security/front desk person who was on duty on July 24, 2015 and July 25, 2015. Montes asserts in her affidavit that she had a conversation with the plaintiff on July 24, 2015, however, she attests that plaintiff did not make any complaints regarding the steps between the first and second floors, but rather plaintiff complained of a step between the fourth and fifth floors. Montes avers that, she cleaned the steps between the first and second floors on July 24, 2015 at approximately 10:30a.m., and there was no Chinese food or any other slippery substance on the steps. Further, Montes attests that at approximately 1:30p.m., on July 24, 2015, she returned to the stairwell between the first and second floor and there was no food, grease, liquids or any other slippery substance on any of the steps. Montes also asserts that at approximately 11:00a.m., on July 25, 2015, she did not see any food or any other slippery substance on the stairwell between the first and second floors. Montes avers that no one directed her to clean any food or any other slippery substance on the stairs between the first and second floors on either July 24, 2015 or July 25, 2015.

Mendez attests in her affidavit that she worked the morning shift from 8:00a.m. to 4:00p.m. on the days in question and that she periodically observed the stairs between the first and second floors. Mendez avers that, she did not observe any debris, food, or other slippery substance on the stairs. Mendez also asserts that on July 25, 2015, at approximately 8:10a.m., she heard a noise coming from the stairs between the first and second floors and saw the plaintiff sitting on the bottom of the stairwell. Further, Mendez avers that, plaintiff refused any assistance

and informed Mendez that she was not injured. Mendez attests that she subsequently observed the stairs where she had first seen the plaintiff and did not see any food, debris, or any other slippery substance on the steps.

Plaintiff opposes the motion, arguing that her deposition testimony establishes a genuine issue of fact as to whether or not actual notice was provided to defendant. Specifically, plaintiff testified that she provided verbal notice to defendant's employee the day before her accident as to the spilled Chinese food on the stairway that caused her to slip and fall. Plaintiff further asserts that her testimony also demonstrates an issue of fact concerning constructive notice in that she provided evidence in admissible form claiming that the dangerous condition that caused her fall existed for approximately 24 hours prior to the accident (Plaintiff's dep at 30). In further support, plaintiff submits an affidavit by her son Jordan Allende sworn on December 29, 2017 and an affidavit by the plaintiff sworn to on December 29, 2017.

In reply, defendant argues that this Court cannot consider the affidavits sworn to by the plaintiff and her son, contending that both affidavits are self-serving and contradict plaintiff's testimony at her deposition.

On a motion for summary judgment, the moving party has the initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1985]). The facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). Once the moving party "produces the requisite evidence, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial

of the action (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40, 49 [2015]). “It is not the court’s function on a motion for summary judgment to assess credibility” (*Ferrante v American Lung Ass’n*, 90 NY2d 623, 631 [1991]).

A property owner is under a duty to maintain its premises in a reasonably safe condition in view of all circumstances, including among others, the likelihood of avoiding injury to others and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233, 241 [1976]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). A defendant moving for summary judgment in a slip and fall action “has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 [1st Dept 2013]). Upon such showing, the burden shifts to the party opposing the motion “to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]). To constitute constructive notice, “a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Applying the legal principles and standard of review cited above, and the divergent facts as alleged by the parties, the Court finds that there are issues of fact that preclude the granting of summary judgment. Specifically, the parties dispute whether or not defendant received notice of the purported condition that caused the accident. Defendant argues that they received no such notice. Conversely, plaintiff maintains that that defendant had actual notice of the alleged dangerous condition because she alerted Montes, prior to the accident, that there was Chinese food on the stairs. The Court concludes that plaintiff’s deposition testimony alone is sufficient to

raise a triable issue of fact as to defendant's actual notice and therefore it need not consider the affidavits sworn to by Jordan Allende and the plaintiff. However, the Court notes that defendant's representation of said affidavits is misleading. Given the conflicting testimony as to whether defendant had actual notice, defendant has failed to eliminate all triable issues of fact warranting denial its motion for summary judgment. Accordingly, it is

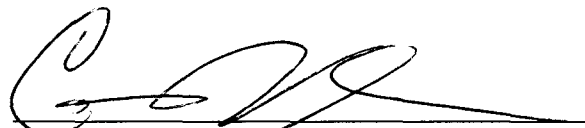
ORDERED that the motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated:

6/14/2018

ENTER:



CARMEN VICTORIA ST. GEORGE, J.S.C.

**HON. CARMEN VICTORIA ST. GEORGE
J.S.C.**