

Croshier v New Horizons Resources, Inc.

2018 NY Slip Op 34389(U)

November 1, 2018

Supreme Court, Dutchess County

Docket Number: Index No. 52784/2016

Judge: Edward T. McLoughlin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
SHELLY CROSHIER,

Plaintiff,

- against -

NEW HORIZONS RESOURCES, INC.,

Defendant.
-----X

McLOUGHLIN, EDWARD T., AJSC

DECISION and ORDER

Index No. 52784/2016

The following papers were considered in connection with defendant's motion for summary judgment seeking to dismiss the complaint:

Defendant's motion, affirmation	
/accompanying exhibits	15-27
Plaintiff's affirmation in opposition	
/accompanying exhibits	32-37
Reply affirmation	39

On November 19, 2013, the plaintiff tripped and fell while in the driveway of New Horizon Resources, Inc., located at 20 Thornwood Drive, Poughkeepsie, New York. Plaintiff sustained injuries as a result of her fall and commenced the instant action on November 18, 2016.

Defendant has now moved for summary judgment seeking dismissal of the action.

Defendant claims that there are no triable issues, as no defective condition existed that the landlord affirmatively created or had actual or constructive notice of its existence. Further, defendant claims that summary judgment should be granted because the plaintiff cannot identify the cause of her fall without engaging in speculation. The plaintiff opposes the summary judgment application.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where

triable issues of fact are raised and cannot be resolved on conflicting affidavits. See Vega v. Restani Construction Corp., 18 NY3d 499; Millerton Agway Co-Op v. Briarcliff Farms, Inc., 17 NY2d 57. It is not the Court's function to determine credibility. See Chimbo v. Bolivar, 142 AD3d 944 (2nd Dept. 2016). Issue finding, rather than issue determination, is the key to the procedure. Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395.

Initially, the proponent must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. However, once the movant makes such a sufficient showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Alvarez v. Prospect Hospital, 68 NY2d 320. In making this determination, the Court must view the evidence in a light most favorable to the opposing party and must give that party the benefit of every inference which can be drawn from the evidence. Nash v. Port Washington Union Free School District, 83 AD3d 136 (2nd Dept. 2011).

It is well settled that a land owner or tenant in possession of the premises must act reasonably in maintaining the premises in question in a safe condition in view of all the circumstances. Basso v. Miller, 40 NY2d 233.

However, summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous. Lezama v. 34-15 Parsons Boulevard, LLC, 16 AD3d 560 (2nd Dept. 2005). This is especially so when the plaintiff cannot identify the cause of her fall without engaging in speculation. Mitgang v. PJ Venture HG, LLC, 126 AD3d 863 (2nd Dept. 2015).

Where a plaintiff cannot identify the cause of her fall without engaging in speculation, a defendant may make a *prima facie* showing of entitlement to summary judgment as a matter of law. Touloupis v. Sear, Roebuck & Company, 155 AD3d 807 (2nd Dept. 2017).

A plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injury, would be based on speculation. Amster v. Kromer, 150 AD3d 804 (2nd Dept. 2017).

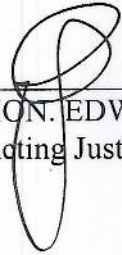
Here, the defendants have established their *prima facie* entitlement to judgment as a matter of law by submitting evidence, including, but not limited to, a transcript of the plaintiff's deposition testimony, which demonstrates that the plaintiff can merely speculate as to the reason for her fall. Blocker v. Filene's Basement #51-00540, 126 AD3d 744 (2nd Dept. 2015); Bryant v. Loft Book Store Café, LLC, 138 AD3d 664 (2nd Dept. 2016).

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted.

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
November 1, 2018



HON. EDWARD T. McLOUGHLIN
Acting Justice Supreme Court

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