

Rosario v Audubon Realty LLC
2019 NY Slip Op 31026(U)
April 9, 2019
Supreme Court, New York County
Docket Number: 156223/2015
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 156223/2015

KENNEDY ROSARIO and LEONIDA GONZALEZ,

MOTION SEQ. NO. 002

Plaintiffs,

- v -

AUDUBON REALTY LLC and SUCCESSFUL MANAGEMENT CORP.,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this personal injury action, defendants Audubon Realty LLC ("Audubon Realty") and Successful Management Corp. ("Successful Management") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiffs Kennedy Rosario ("Rosario") and Leonida Gonzalez ("Gonzalez"). Defendants further move for an order granting them the costs of litigating this action. Plaintiffs oppose the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Rosario and Gonzalez, who are married, reside in an apartment building located near the intersection of Audubon Avenue and 177th Street in Manhattan. (Docs. 35; 52 at 1-2.) On June 15, 2015, plaintiff Gonzalez left the apartment to go shopping, but did not take her keys with her.

(Doc. 52 at 2.) Around noon, plaintiff Rosario went to the outside of the building to meet his wife so that he could open the door for her. (Docs. 38 at 2; 52 at 2.) Rosario walked around the block because his wife had not yet returned. (Doc. 52 at 2.) Upon circling the block, he stopped to wait at the front of the building and leaned against a railing. (*Id.* at 3.)

The railing was actually two railings which ran horizontally and were parallel to each other. (Docs. 34 at 5; 43.) The railings were supported by two large square cement columns affixed to the sidewalk. (Docs. 34 at 5; 43.) Pictures submitted by plaintiffs establish that there were spikes running along the surface of the top railing. (Doc. 43.) Rosario testified as follows:

I was going to lean against or kind of sit my lower back against that portion of the top railing in front of the teeth, while supporting myself with my feet on the lower railing. I tried to do that and I lifted my left foot and put it on the lower railing and leaned my lower back against the top railing in front of the teeth. When I did that, the upper railing suddenly fell and moved downward causing me to fall backwards into the space between the sidewalk and the building.

(Doc. 52 at 3.) Rosario fell more than eight feet into the space between the railing and the building.

(Doc. 28 at 15.)

In support of their motion, defendants proffer a surveillance video recording of the incident. (Defs.' Ex. B.) The video recording shows both the sidewalk and the railing. (*Id.*) In the video, plaintiff can be seen walking on the sidewalk and stopping to lean against the railing. (*Id.*) As he lifted his leg up—presumably to rest his leg on the lower railing—plaintiff lost his balance and fell backward into the space. (*Id.*)

Plaintiffs commenced this action against defendants on June 25, 2015 by filing a summons and complaint. (Doc. 35.) In the complaint, plaintiffs asserted causes of action for negligence and loss of consortium. (*Id.* at 6–9.) Defendants filed their answer on November 15, 2015. (Doc. 36.)

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for an order granting them the costs of litigating this action. (Doc. 26.) Defendants admit that the top of the railing was somewhat bent and not aligned with the lower part of the railing. (Doc. 27 at 15–16.) Nevertheless, they argue that summary judgment must be granted because the video establishes that Rosario was the sole proximate cause of the accident and there were no dangerous conditions on the premises that contributed to plaintiff's fall. (Doc. 28 at 10–18.) In particular, they assert that Rosario's act of attempting to sit on the top railing constituted a superseding event that broke the nexus between their alleged negligence of failing to maintain the top railing and Rosario's fall. (*Id.* at 10.) They also argue that the railing was not defective and that it did not shift when Rosario leaned on it. (*Id.* at 18–20.) In support of this contention, defendants submit the affidavits of expert witnesses Angela DiDomenico ("DiDomenico") and William Marletta ("Marletta"), who opined that the top railing did not move or give way. (Docs. 33 at 12; 34 at 8–9.) Further, they submit the affidavits of Edwin Algarin ("Algarin"), the property manager of the premises, and Adonibal Cordero ("Cordero"), the building's superintendent, who both claim that they had never received any complaints regarding the top rail prior to Rosario's accident. (Docs. 31 at 3; 32 at 4.) Thus, defendants assert that, even if there were a defect in the railing, they lacked notice of it and therefore cannot be held liable. (Doc. 28 at 21–22.)

In opposition, plaintiffs argue, *inter alia*, that the motion should be denied because there are factual issues regarding whether the railing shifted when Rosario sat on it. (Doc. 61 at 3–7.) Plaintiffs proffer the affidavits of David Seepersad ("Seepersad") and William Rodriguez ("Rodriguez"), who claim that they witnessed Rosario's accident and that they allegedly observed the top railing "collapse." (Docs. 51 at 6–8; 53 at 3; 54 at 2.) Moreover, plaintiffs submit affidavits of two people who frequented the area, Felix Reyes ("Reyes") and Sobeida Hernandez

(“Hernandez”), who claim that they observed that the bolts fastening the top railing to the concrete posts were unsecured for several years prior to the accident. (Docs. 51 at 8–10; 55; 56 at 2–3.) Plaintiffs maintain that “[t]he fact that [Rosario] may be comparatively at fault for the happening of his accident, which is denied, does not relieve Defendants of liability.” (Doc. 61 at 8.) Thus, it is their contention that Rosario’s accident “occurred only because the upper railing was in a dangerous and defective condition and collapsed” (*Id.*) Further, plaintiffs maintain that defendants failed to maintain the premises in a safe condition and to warn pedestrians about the condition of the railing. (*Id.* at 8–11.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

This Court finds that defendants established their prima facie case of entitlement to judgment as a matter of law. Assuming that the top railing shifted as Rosario leaned against it, the affidavits of Cordero and Algarin demonstrate that defendants did not have notice of the railing’s

allegedly defective condition. (*See Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001] (“Where the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed.”).) In this regard, both affiants testified that they had never observed any problems with the railing nor received any complaints about it prior to Rosario’s accident. (Docs. 31 at 3; 32 at 4–5.) Moreover, defendants’ expert witnesses, DiDomenico and Marletta, concluded in their studies that the top railing did not shift or give way. (Docs. 33 at 12; 34 at 8–9.) Thus, defendants demonstrated that the accident occurred not because the railing was defective, but because Rosario lost his balance as he attempted to shift more of his weight onto the top railing.

Nevertheless, the motion for summary judgment must be denied because plaintiffs raised an issue of fact in opposition. Importantly, plaintiffs submitted the affidavits of two purported eyewitnesses, Seepersad and Rodriguez, who claim that they saw the top railing “collapse” as Rosario leaned back on it. Although defendants challenge the credibility of these witnesses, “[i]t is not the court’s function on a motion for summary judgment to assess credibility. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge” (*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept 2013] (citations omitted).) Further, the affidavits of Hernandez and Reyes raise issues of fact regarding whether defendants had notice of the railing’s defective condition, since they allege that the top railing had been unsecured from the concrete posts for years. (Docs. 55–56.) Therefore, the motion for summary judgment must be denied.

In accordance with the foregoing, it is hereby:

ORDERED that defendants Audubon Realty LLC and Successful Management Corp.'s motion for summary judgment dismissing the complaint is denied; and it is further

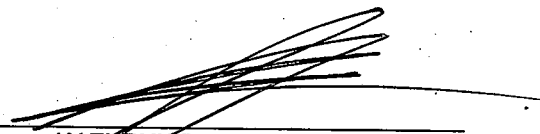
ORDERED that the branch of defendants' motion seeking an order granting them the costs of litigating this action is denied; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, defendants' counsel is to serve a copy of this order, with notice of entry, on plaintiffs; and it is further

ORDERED that this constitutes the decision and order of this Court.

4/9/2019

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE