

Singh v JFB Realty LLC
2019 NY Slip Op 32192(U)
March 22, 2019
Supreme Court, Bronx County
Docket Number: 21402/2016E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 15

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CALVIN SINGH,

Plaintiff,

Index No.: 21402/2016E

- against -

DECISION/ ORDER

JFB REALTY LLC, MAGNOLIA OPERATING LLC,
MAGNOLIA BAKERY, INC., E. MINIER-
DELOSSANTOS AND J. MINIER,

Defendants.

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HON. MARY ANN BRIGANTTI

Defendants Magnolia Operating LLC and Magnolia Bakery, Inc. (“Magnolia” or “lessee”) and defendant JFB Realty, LLC (“JFB” or “lessor”) seek summary judgment, pursuant to CPLR 3212, dismissing all claims and cross claims filed against them.

On or about March 1, 2016, plaintiff commenced this action to recover damages for personal injuries allegedly sustained when he fell while descending a stairway leading from the sidewalk to the basement of the premises located at 200 Columbus Avenue, in New York County. The property was owned by JFB and leased to Magnolia, pursuant to a lease agreement dated June 14, 2007 (“Lease”). Article One, Section 1.1(viii) of the Lease’s rider (“Rider”) describes the demised premises as “the ground floor store premises and basement thereunder, as delineated on Exhibit A.” Article Seven, Section 7.2 of the Rider provides that the lessor was responsible for structural repairs “to the Building and the leased premises,” which includes “the floor slab, the foundation, the demising walls, the outside walls, load bearing columns and the roof.” Section 7.4 of Article Seven of the Rider obligated the lessee to “keep the interior of the leased premises [and] the exterior doors

and entrances . . . in good order, condition and repair and will make all repairs and replacement from time to time required thereto at [lessee's] sole cost and expense promptly.”

Plaintiff alleges that on the morning of April 15, 2013 he was using a hand-truck to make a delivery of merchandise to Magnolia, including 50 lb bags of flour. This was his first time making a delivery to the subject premises. He alleges that as he was caused to fall because of the defective and broken nature of the first step, the stairs were of irregular heights and widths, and the stairs were of insufficient widths. In this regard, plaintiff testified that the area where he slipped on the first step was “chipped, small and broke[n]” and the second step was not large enough to hold a hand truck’s wheels. Plaintiff further asserts that defendants violated the NYC Administrative Code applicable to safe stairwells.

PARTIES’ CONTENTIONS

In seeking summary judgment, Magnolia supplies, the pleadings; the deposition testimony of plaintiff, Joseph Franco on behalf of JFB, and Ava-Gaye Taylor on behalf of Magnolia; the affidavit of Peter Chen, a licensed engineer and accident reconstructionist; and the Lease. First, based upon the findings of Mr. Chen’s on site inspection on December 5, 2017, Magnolia contends that the subject stairwell was not defective or in violation of any administrative codes. Mr. Chen reviewed the parties’ deposition testimony and exhibit photographs. He avers that the condition of the stairs were in substantially the same condition as the exhibit photographs he reviewed. Mr. Chen contends that the stairwell is an “access stair” as it is covered by a lockable bulkhead door, on the sidewalk, when not in use and does not serve as a means of egress, escape or a required interior stairs.¹ He

¹The NYC Administrative Code Section 27-232 defines an “access stair” as a “stair between two floors, which does not serve as a required exit.”

maintains that the first step down was a concrete step with “an 8 7/8 inch rise height and a tread depth of 10 ½ inch with a 1 inch nosing.” He concludes that there was no evidence that the access stairs were ever altered or modified in any manner since 1910, when the building was originally constructed. He also maintains that there were no complaints in the NYC Department of Buildings or Housing and Preservation Development systems against the subject stairs. Mr. Chen concludes that the stairs were “reasonably safe for use for the purposes in which the stairs were originally constructed,” that there was no evidence of structural collapse, and the treads were of sufficient and full depth (greater than nine inches) to support a hand truck.

Secondly, Magnolia argues that plaintiff’s own reckless actions were the sole proximate cause of the subject accident. In this regard, Mr. Chen opines that the accident was due to plaintiff’s failure to follow known safety practices including a failure to visually inspect the stairs prior to use, or to use the slide that was available to him. Magnolia points out that plaintiff had never made a delivery to the premises before, he did not ask for help, and did not break up his pallet-worth of merchandise into smaller loads.

Magnolia contends that it owed no duty of care to plaintiff as the stairwell was not included in the demised premises, that JFB was obligated to maintain the basement stairwell, and JFB was responsible for structural repairs to the building and the leased premises. Magnolia asserts that it was only responsible for non-structural repairs on the demised premises and the sidewalks adjacent thereto. Magnolia references Exhibit “A” of the Rider which contains a diagram denoting the demised premises. The area of the basement which illustrates the subject stairwell is not included within the hand drawn crosshatched lines.

Finally, Magnolia contends that it did not create the alleged defect, nor did it have actual or constructive notice of the defect and an opportunity to remedy it. Here, Magnolia relies upon the testimony of all the parties that no complaints regarding the stairwell were ever made prior to the accident, no one was ever observed making repairs to the stairwell and there were no prior violations or accidents. Franco testified that JFB has owned the property for approximately 20 years. He visited the property daily. He testified that he would be the individual to receive notice of any violations related to the stairs, but he is not aware of any violations or complaints. He could only recall one instance in which he went down the subject stairwell, in approximately 2012 or 2013, and at that time he did not notice any problems with the stairs. Specifically he testified that the stairs appeared to be “fine.” He also testified that he is not aware of any repairs being done to the stairs in the past ten years. Franco contends that JFB has no right to enter the basement and that in order to enter the basement JFB would have to speak to someone at Magnolia before they entered.

Ms. Taylor testified that she was a manager at the subject Magnolia location on Columbus Avenue, on the date of the accident. Ms. Taylor stated that the subject stairwell was utilized by Magnolia to take out garbage on a daily basis and that she personally used the stairs for that purpose on a few occasions. She also utilized the stairs on other occasions for other reasons. Ms. Taylor was not aware of any complaints or repairs involving the subject stairwell. In terms of deliveries, Ms. Taylor testified that delivery personnel was responsible for bringing the merchandise into the basement and then Magnolia staff would handle it.

In support of their motion JFB submits, *inter alia*, the pleadings, the parties’ deposition testimony and the affidavit of Paul Morris, a licensed engineer. JFB does not argue that it is an out of possession lessor, but rather contends that there is no evidence that the subject step was defective

in any way and that if a defect was present, at the time of the accident, the evidence demonstrates that JFB had no actual or constructive notice of same. In terms of the absence of a defect, Mr. Morris inspected the subject stairwell on February 16, 2018 determining that the highest tread was made of stone, measured 35" in length and 10 3/8" in width, including the nosing, and was 4 3/4" below sidewalk level. Mr. Morris concluded that the treads and risers, at issue, complied with applicable statute and regulations,² were of appropriate width (at least 9 1/2") and rise (maximum riser height of 7 3/4"), were kept in good repair, and did not contain any defects or evidence of structural collapse. JFB argues, based upon Mr. Morris conclusions, that plaintiff cannot establish that his fall was caused by any dangerous or defective condition and the action must be dismissed. Moreover, JFB contends that there was no actual or constructive notice of any defective condition, statutory violation, or structural or design defect. In addition, it is argued that plaintiff's testimony that the step was "broken, chipped and small" does not demonstrate that the step was defective. JFB contends that the evidence demonstrates that it did not make repairs or maintain the stairs in 15 years and, therefore, it did not cause or create the alleged defect.

In opposition, plaintiff contends that his testimony regarding the condition of the stairs and photos taken shortly after the accident raise triable issues of fact precluding summary judgment. Plaintiff objects to defendants' experts' affidavits on the grounds that expert disclosures were not served until after the filing of the note of issue and on the ground that the experts never reviewed contemporaneous photographs of the stairwell, inspected the stairs more four years after the accident and failed to annex their own photographs of what the stairs looked like at the time of their

² Section 28-301.1 of the NYC Admin Code (safe and good working condition); Section 52(3) of the New York Multiple Dwelling Law (minimum and maximum width and heights), Section 52(1) of the New York Multiple Dwelling Law (stair riser and treads in good repair).

inspections. Thus, plaintiff argues, defendants fail to offer any evidence as to the condition of the stairs on the day of the accident or that it was not in a defective condition. Plaintiff asserts that there are issues of fact as to whether Magnolia created the defective condition and whether JFB and Magnolia had constructive notice of the defective condition of the stairs, as the condition existed for an extended period of time. In this regard, plaintiff maintains that JFB and Magnolia fail to meet their respective prima facie burden as they do not submit any evidence that they regularly inspected, maintained or repaired the stairs. Finally, plaintiff asserts that Magnolia had a duty to warn plaintiff of the defective condition of the subject stairs because they required plaintiff to use them. Plaintiff supplies three photographs of the subject stairs that were identified at plaintiff's deposition and marked with the location of where plaintiff's foot slipped on the first stair tread.

In reply, Magnolia argues that plaintiff's attorney's affirmation lacks evidentiary basis as to the existence of a defect and constructive notice. Magnolia contends that plaintiff's argument that the stairs could have been repaired between the time of the accident and Mr. Chen's inspection is pure speculation. In any event, the deposition testimony demonstrates that there were no repairs made to the subject stairwell. More specifically, Magnolia maintains that the stairs were a structural part of the premises that has remained unaltered for decades and that any changes to the stairs required the permission or consent of the owner. Magnolia points out that there is no dispute that Magnolia lacked actual notice of the alleged defective condition, and that, in the absence of proof of a defective condition, there can be no proof of constructive notice. In reply, JFB contends, *inter alia*, that plaintiff's photographic evidence and testimony alone is not sufficient to rebut JFB's engineer's conclusion that the stairs were not defective.

DISCUSSION

To be entitled to the “drastic” remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*see Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Once a movant meets his or her initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*see Bush v Saint Claire's Hospital*, 82 NY2d 738 [1993]).

“Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property’ (*Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 710, 940 NYS2d 144 [2012]. . .)” (*Rodriguez v 5432-50 Myrtle Ave., LLC*, 148 AD3d 947, 948 [2d Dept 2017]; *see Colon v Corporate Bldg. Groups, Inc.*, 116 AD3d 414, 414 [1st Dept 2014]). “It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to a third party, the potential that such injury would be of a serious nature, and the burden of avoiding such risk” (*Alexander v NY City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]; *see Peralta v Henriquez*, 100 NY2d 139 [2003]). A “tenant owes a common-law duty of reasonable care to maintain the

demised premises in a reasonably safe condition, independent of any obligation that might be imposed by the existence of a lease” (*Williams v Esor Realty Co.*, 117 AD3d 480, 480 [1st Dept 2014]; see *Sarisohn v 341 Commack Rd., Inc.*, 89 AD3d 1007, 1009 [2d Dept 2011]; *Reimold v Walden Terrace, Inc.*, 85 AD3d 1144, 1145 [2d Dept 2011]).

Magnolia fails to demonstrate, as a matter of law, that it owed no duty of care to plaintiff to maintain the subject stairway. While the hand drawn crosshatched lines on Exhibit A to the Lease, does not include the stairway, the lease agreement provides that the demised premises includes the basement for the purpose of storage, and that Magnolia was to be responsible for non-structural repairs to the leased premises and the exterior doors and entrances. Magnolia offers no evidence that the alleged defect was structural in nature. In addition, while the Lease reserved the lessor’s unrestricted right to access the basement, such access was for the limited purpose of servicing and repairing the building’s machinery and all systems located in the basement, and Franco testified that JFB would have to speak to Magnolia staff prior to accessing the basement. Moreover, the evidence establishes that the Magnolia exercised dominion and control over the subject basement and stairway. Magnolia utilized the basement for storage, food preparation, and as an employee break room. The subject stairs were used for daily trash removal and to receive regular deliveries. There is no evidence that any party other than Magnolia made use of the basement and stairway. Here, there is ample evidence to suggest that Magnolia and its employees were in possession of, occupied, and controlled access to the basement where the subject stairway was located imposing upon it a common law duty to maintain the subject stairway in a reasonably safe condition (*see Adriana G. v Kipp Washington Hgts. Middle Sch.*, ___AD3d___, 2018 NY Slip Op 06787, *1 [2018])[defendant’s failed to establish the lack of common-law duty to maintain a fence in a reasonably safe condition that was located

within a playground based upon evidence that the defendant's employees were in possession of, occupied, and controlled access to the playground where the alleged hazard in a chain link fence was located when the accident occurred]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 855 [2d Dept 2011][defendant bank owed a common law duty to keep parking lot in a reasonable safe condition as the lease agreement included the building and the parking lot and bank had possession and control over the parking lot where plaintiff's accident occurred]).

JFB and Magnolia meet their prima facie burden by demonstrating that the subject stairway was not defective at the time of the accident through the affidavits of their experts who inspected the subject stairway, found it to be in compliance with the applicable statutes and regulations, in good repair and lacking any defects. The experts' affidavits may be considered since there is no allegation or evidence that the failure to disclose the identity of its expert witness pursuant to CPLR 3101(d) was intentional or willful, and there is no showing of prejudice to the plaintiff (*see Cobham v 330 W. 34th SPE, LLC*, 164 AD3d 644, 645 [2d Dept 2018]). In addition, the testimony demonstrates that the stairway had not been repaired by either JFB or Magnolia, at any time, and, thus, the stairway remained in a substantially similar condition to the photographs of the stairs taken shortly after the accident. In addition, there is no proof that JFB or Magnolia created the alleged defective condition or had actual notice of any defective condition of the subject stairway. Specifically, defendants' experts' aver that there are no related violations recorded against the property and the parties testified that there have been no violations, complaints or accidents involving the subject stairway.

However, in opposition plaintiff's testimony and the photographs of the subject stairway are sufficient to raise a triable issue of fact as to whether the first tread of the stairway, which was allegedly constructed of stone and not modified or reconstructed since 1910, contained a dangerous

condition that was a proximate cause of plaintiff's fall (*see Togut v Riverbay Corp.*, 114 AD3d 535, 535 [1st Dept 2014]; *Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555, 557 [1st Dept 2012]; *Alexander v NY City Tr.*, 34 AD3d 312). At his deposition plaintiff identified a worn and indented portion of the nosing of the top-most tread and testified that such condition caused his foot to slip and for him to fall. "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*De Long v County of Erie*, 60 NY2d 296, 307 [1983]). Contrary to defendants' contention expert testimony here was not required to raise an issue of fact as to whether a defective condition existed on the subject stair since plaintiff does not allege a defect beyond the ken of the typical juror (*see generally Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; *Johnson v Village of Saranac Lake*, 279 AD2d 784, 785 [3d Dept 2001]). "[W]hether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury (*Pitt v New York City Tr. Auth.*, 146 AD3d 826, 827, 44 N.Y.S.3d 525, *citing Trincere v County of Suffolk*, 90 NY2d 976, 977, 688 N.E.2d 489, 665 N.Y.S.2d 615)" (*Hopkins v St. Agnes R.C. Church at Rockville Ctr.*, 160 AD3d 705, 705-706 [2d Dept 2018]).

"In determining whether a defect is trivial, and non actionable as a matter of law, the court must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury'" (*Coriat v Miller*, ___ AD3d ___, 2018 NY Slip Op 05998, *1 [2018][citations omitted]). Moreover, there is no *per se* rule with regard to the dimensions of a defect that will give rise to liability (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66; *Alexander v NY City Tr.*, 34 AD3d at 313). Here, considering the location of the alleged defect, the depth of the tread upon which the defect was

located, the fact that the alleged defect was on the top-most step of a basement access stairway utilized for deliveries, and that the accident occurred during a delivery, the court cannot conclude as a matter of law that the alleged defect is not dangerous or actionable (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66; *Suarez v Emerald 115 Mosholu LLC*, ___AD3d___, 82 NYS3d 22, 23-24, 2018 NY Slip Op 06059, *1 [2018]; *Coriat v Miller*, ___AD3d___, 2018 NY Slip Op 05998, *1 [2018]).

In terms of defendants' notice of the alleged defective condition, a defendant is charged with having constructive notice of a defective condition when said condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). “[P]hotographs may be used to prove constructive notice of an alleged defect shown in the photographs if they are taken reasonably close to the time of the accident, and if there is testimony that the condition at the time of the accident was similar to the condition shown in the photographs” (*DeGiacomo v Westchester County Healthcare Corp.*, 295 AD2d 395 [2d Dept 2002]; *see Alcantara v NY City Tr. Auth.*, 140 AD3d 808, 809 [2d Dept 2016]; *Simmons v NY City Tr. Auth.*, 110 AD3d 625, 625 [1st Dept 2013]; *Gonzalez v NY City Tr. Auth.*, 87 AD3d 675, 677 [2d Dept 2011]). Here, plaintiff testified that the photographs were taken shortly after the accident and accurately depicted the stairs at the time of the accident. In addition, there is testimony that no repairs were made to the subject stairs. A jury may properly infer from the irregularity, width, depth and appearance of a defect exhibited in a photograph, that the condition had to have come into being over such a length of time that knowledge thereof should have been acquired by the defendant in the exercise of reasonable care (*see Taylor v NY City Tr. Auth.*, 48 NY2d 903, 904 [1979]; *Alexander v NY City Tr.*, 34 AD3d at

313-314). Material issues of fact as to whether a dangerous condition existed on subject stair, at the time of the accident, and whether defendants can be charged with constructive notice of such condition precludes summary judgment in favor of JFB or Magnolia. Accordingly, it is

ORDERED, that the motions for summary judgment are denied.

This constitutes the decision and order of the Court.

Dated: *March 22, 2019*

E N T E R,



MARY ANN BRIGANTTI J.S.C.