

Massey v Thor 98 Morningside Ave., LLC

2019 NY Slip Op 32502(U)

August 23, 2019

Supreme Court, New York County

Docket Number: 151702/2016

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SYLVIA MASSEY,

Plaintiff,

-against-

THOR 98 MORNINGSIDE AVENUE, LLC, and THOR
MANAGEMENT COMPANY RN, LLC,

Defendants.

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CAROL R. EDMEAD, J.S.C.:

DECISION AND ORDER

Index No.: 151702/2016

Motion Sequence 001

MEMORANDUM DECISION

In this negligence action, defendants Thor 98 Morningside Avenue, LLC and Thor Management Company RN, LLC (collectively, Defendants), move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint against them.

BACKGROUND FACTS

On December 27, 2015, Plaintiff was visiting the home of her boyfriend’s mother at 98 Morningside Avenue in Manhattan. Due to construction at the building, a short wooden staircase had been installed in front of the building’s entrance. Plaintiff and her boyfriend exited the building late at night after a rainstorm had begun. While walking down the stairs behind her boyfriend, Plaintiff fell while moving from the first step to the second, allegedly due to the fact that the “grip” or “rubber piece” meant to prevent slipping was missing from the second step (NYSCEF doc No. 22, ¶ 14). Plaintiff had never noticed the grip missing prior to this incident,

and had never had difficulty using the stairs before, including earlier that same evening while entering the building.

Defendants, the owner and property manager of the subject building, now move for summary judgment, arguing that they did not have actual or constructive notice of any alleged defect in the wooden staircase. Defendants also contend that even if there was a hazardous condition in the staircase, they did not have adequate time to remedy it due to the ongoing rainstorm. In reply, Plaintiff opposes the motion and argues that Defendants did not meet their initial burden of proof in demonstrating that they had no notice of the defect, and that there are issues of fact regarding the cause of Plaintiff's fall. Plaintiff also retained an engineer who testified that the staircase was in violation of the applicable building code.

DISCUSSION

Summary judgment is granted when “the proponent makes ‘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,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept

2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, “regardless of the sufficiency of the opposing papers” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

A property owner seeking summary judgment in a negligence action is “required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property” (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). In a trip and fall action, the defendant who moves for summary judgment must demonstrate “that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [internal citations omitted]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Zuk v Great Atl. & Pac. TeaCo., Inc.*, 21 AD3d 275, 275 [1st Dept 2005]).

Of course, for a defendant to be liable for a dangerous condition, one must exist on the property in the first place. The issue of “whether a dangerous or defective condition exists on the property of another so as to create liability ... is generally a question of fact for the jury” (*Trincere v Cnty. of Suffolk*, 90 NY2d 976, 977 [1997]). When a defect exists, constructive notice to the defendant requires that the defect 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]).

Here, Defendants contend that they never had actual nor constructive notice of the alleged defect. The existence of a potential slipping hazard alone does not give rise to a negligence action; plaintiff must also demonstrate that the defendant had notice and a reasonable time to cure (*Mercer v City of New York*, 88 NY2d 955 [1996]). Plaintiff here did not notify Defendants of the alleged defect, as she had never seen it before, and Plaintiff does not offer any evidence pertaining to how long the alleged defect existed in the staircase. Defendants contend that, since there is no record of complaints regarding the staircase, they could not have had notice. However, this notion reverses the evidentiary burden in slip and fall cases. The burden is not on Plaintiff to show that Defendants had notice, but rather on Defendants to prove that they did not. A lack of prior complaints alone is not sufficient (*Weingrad v NYU*, 65 NY2d 852 [1985]). Thus, a question of fact exists as to whether or not Defendant had notice of the alleged defect, as well as how long the alleged defect existed.

Plaintiff also retained an expert, engineer Nicholas Bellizzi, who examined the documentary evidence and made a site inspection. Mr. Bellizzi concluded that the condition of the staircase violated several provisions of the 1968 New York City Building Code (NYCBC), which governs requirements for stairways adjacent to buildings (NYSCEF doc No. 22, ¶ 69). In particular, Section 27-375 (h) of the NYCBC requires treads to be made of, or surfaced with, non-skid materials. Plaintiff argues that this statutory violation is *prima facie* evidence of a defect in the staircase. Defendants, however, urge the Court to not afford deference to Mr. Bellizzi's report, as he examined the subject property in 2019, long after the temporary staircase had already been removed from the property (NYSCEF doc No. 39, ¶ 6). However, even if the

Court entirely disregards the expert's report, questions of fact still exist regarding the danger that the alleged defect posed and the amount of time it had been present.

Defendants additionally argue that they are entitled to dismissal as the true cause of Plaintiff's fall was not the missing grip tread, but rather the rainstorm that was ongoing at the time of the accident. Plaintiff testified that she had no difficulty walking up the stairs earlier that evening, when it was not yet raining (NYSCEF doc No. 25 at 31-36). It is true that a "landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while a storm is in progress, and does not commence until a reasonable time after the storm has ended" (*Weinberger v 52 Duane Assoc. LLC*, 102 AD3d 618, 619 [1st Dept 2013]). However, the "storm in progress" defense is generally employed in circumstances involving a snow or freezing rain storm, where it would be dangerous for workers to be out in the storm (*Powell v MIG Associates. LP*, 290 AD2d 345 [1st Dept. 2002]). Plaintiff's statement that she previously used the stairs safely is also not dispositive, as that statement does not entirely negate the possibility that her later accident was connected to the alleged defect and not the rainstorm (*Bolton v ABM 75 Realty LLC*, 2012 NY Misc LEXIS 3547, 11 [Sup Ct., NY Cty. 2012]).

The applicability of the "storm in progress" defense is also rendered moot here, as Plaintiff and Defendants fundamentally disagree on whether Plaintiff's accident was caused by the alleged missing grip or the rainstorm. As there are two possible effective proximate causes here, the presence of water or ice on the stairs does not completely negate liability for Defendants. When two causes combine to create an accident, for one of which the defendant is responsible, there is liability even though the other cause may have been a contributing factor

(see *Nahimas v Concourse 163rd St. Corp.*, 41 AD2d 719 [1st Dept. 1973]). Therefore, the fact that Plaintiff fell while walking down the stairs during the rainstorm but not while walking up the stairs earlier does not mean that there is no question of liability. Furthermore, the issue of whether the alleged grip in the stairs or the rainstorm caused Plaintiff's accident is one for a jury to decide.

As Plaintiff has raised questions of fact regarding Defendants' notice about the alleged defect in the staircase and the proximate cause of her fall, summary judgment is an improper remedy at this juncture.

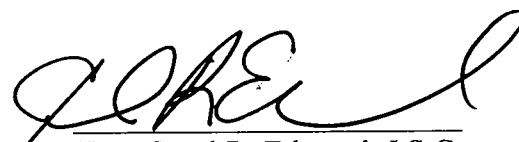
CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendants Thor 98 Morningside Avenue, LLC and Thor Management Company RN, LLC's motion for summary judgment dismissing the Complaint is denied; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: August 23, 2019



Hon. Carol R. Edmead, J.S.C.