Rossi v 88th Garage Corp.
2019 NY Slip Op 32773(U)
September 17, 2019
Supreme Court, New York County
Docket Number: 158380/2016
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 158380/2016

DEBRA ROSSI, ROBERT ROSSI,

Plaintiff,

MOTION DATE 05/23/2019, 05/23/2019

MOTION SEQ. NO. 003 004

- v -

88TH GARAGE CORP., GELODA/BRIARWOOD CORP., ZIPCAR, INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 75, 83, 84, 85, 86, 87, 88, 89, 90, 91, 103, 106

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 82, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105

were read on this motion for SUMMARY JUDGMENT.

Levine & Slavit, PLLC (Ira B. Slavit of counsel), for plaintiffs.
Obermayer Rebman Maxwell & Hippel LLP (Young Min Lee of counsel), for defendant 88th Garage Corp. and Geloda/Briarwood Corp.
Zaklukiewicz, Puzo & Morrissey, LLP (Craig M. Dolinger of counsel), for defendant Zipcar, Inc.

Gerald Lebovits, J.:

Zipcar, Inc. (Zipcar) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and any cross claims against it. 88th Garage Corp. (Garage Corp.) and Geloda/Briarwood Corp. (Geloda) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and any cross claims against them. The motions are consolidated for disposition and decided as noted below.

Underlying Allegations

Plaintiff Debra L. Rossi (Debra) states that on May 8, 2016, she, her husband Robert A. Rossi (Robert), and their daughter Julie Rossi (Julie) left their apartment for a Mothers Day outing, walking to a garage (the Garage), located at 100 West 89th Street, New York, New York, to pick a Zipcar vehicle (the Car) that Robert had called to reserve for their trip (Debra EBT

[NYSCEF Doc. No. 53] at 15-27, 29; Robert EBT [NYSCEF Doc. No. 54] at 9-12, 17). The building in which the Garage is located is owned by Geloda (Answer, [NYSCEF Doc. No. 6], admitted, ¶¶ 2-3] and the Garage is operated by the Garage Corp. (Answer [NYSCEF Doc. No. 2], admitted, ¶ 1).

Zipcar has vehicles located in various parking lots, including the Garage, pursuant to a contract (the Contract) with Garage Corp. (Slavitt affirmation, Exhibit A [NYSCEF Doc. No. 84], ¶ 2; Daraja EBT [NYSCEF Doc. No. 57] at 11). Zipcar members have access to vehicles pursuant to agreements with Zipcar and they have electronic cards that allow access to the reserved vehicles (Slavitt affirmation, Exhibit C [NYSCEF Doc. No. 86]; Debra EBT at 20; Robert EBT at 17-18). Garage Corp. attendants have a master electronic card that allows them access to Zipcars (Bissert EBT [NYSCEF Doc. No. 56] at 49). The Contract includes a provision that requires attendants to bring out Zipcar vehicles to customers (Contract, ¶ 2). It is also the general practice for garage attendants to bring out a vehicle to a Zipcar customer (Debra EBT at 21, 92; Robert EBT at 24; Bissert EBT at 24, 27; Daraja EBT at 14-16).

Debra alleges that she and her family went down the ramp to get the Car, that the attendant did not bring out the Car to them, but rather pointed it out to them (Debra EBT at 24-25, 100; Robert EBT at 12-13). Robert states that he opened the Car with his access card and then manually opened the back hatch for Debra (*id.* at 17-19). Debra alleges that she opened the back hatch of the Car to put her tote bag into the back, and that as she tried to close the hatch, she took a step back and her left foot caught on a cement block, known as a wheel stop (the Wheel Stop), causing her to fall backwards onto the Wheel Stop (Debra EBT at 30, 33-37, 42-43, 105). Neither Robert nor Julie saw Debra fall (Debra EBT at 16, 37; Robert EBT at 25-27). Both Debra and Robert state that they were not looking at the floor and did not see the Wheel Stop before Debra's fall (Debra EBT at 40-41, 105-106; Robert EBT at 44-45). Robert took a photograph (the Photograph [NYSCEF Doc. No. 60]) of the Wheel Stop and the rear of the Car a few minutes after the accident and the Photograph fairly and accurately reflects the Wheel Stop and the area of the Garage (Debra EBT at 38-39; Robert EBT at 28; Bissert EBT at 15) .

Debra contends that, as a result of the fall, she suffered a fractured left wrist that required surgical insertion of a metal plate with pins to repair the broken bone and that she still suffers pain from the accident (Debra EBT at 61-62, 69-72, 82). Robert's claim is for loss of consortium (Complaint [NYSCEF Doc. No. 1], ¶ 37).

Defendants contend that the Wheel Stop was open and obvious, that Debra could and should have seen it and that, consequently, their motions to dismiss the complaint should be granted.

Plaintiffs assert in opposition that Debra's view of the Wheel Stop "was blocked" and that therefore the Wheel Stop was not readily observable (Slavitt affirmation, Exhibit B, Debra affidavit [NYSCEF Doc. No. 85] at 3). They also contend that the Car's placement was improper and that by not bringing the Car to them, Garage Corp. breached its obligation under the Contract. They also state that the color of the Wheel Stop made it optically unclear. Finally,

plaintiffs note that generally whether a condition is open and obvious is an issue of fact that should be resolved by a jury and they therefore contend that defendants' motions should be denied.

Defendants note in their reply papers that Debra stated in her deposition that she did not look at the floor behind the Car and that she did not see anything behind it (Debra EBT at 40-41, 105) and the claim in her affidavit that her view of the Wheel Sop was blocked contradicts her deposition testimony and should not be considered. They state that, for the same reason, the claim of optical illusion cannot be considered. Defendants assert that the deposition testimony and the Photography establish that the Wheel Stop was readily observable and, it was, therefore, an open and obvious condition. They further state that the breach of a duty to bring out a vehicle is a higher standard than ordinary care and consequently may not support a claim of negligence. Accordingly, they seek dismissal of plaintiffs' complaint.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

However, "[a] party's affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007] *quoting Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *see also Kistoo v City of New York*, 195 AD2d 403, 404 [1st Dept 1993]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of

injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, in order to be held liable, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition, or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Amendola v City of New York*, 89 AD3d 775, 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726, 726 [2d Dept 2010]). However, a "[d]efendant [has] met its prima facie burden by submitting evidence that it did not own, control or create the [allegedly dangerous condition] that caused plaintiff to fall" (*Singleton v Consolidated Edison Co. of N.Y., Inc.*, 112 AD3d 491, 491-492 [1st Dept 2013]; *see also Colon v Corporate Bldg. Groups, Inc.*, 116 AD3d 414, 414 [1st Dept 2014]; *Lopez v Allied Amusements Shows, Inc.*, 83 AD3d 519, 519 [1st Dept 2011]).

Internal Rules Inadmissible

"[I]nternal guidelines [that] go beyond the standard of ordinary care . . . cannot serve as a basis for imposing liability" (*Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]; *see also Rivera v New York City Tr. Auth.*, 77 NY2d 322, 329 [1991]; *Blackwood v New York City Tr. Auth.*, 36 AD3d 522, 523 [1st Dept 2007]).

Contractor's Tort Liability

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party . . . [However,] under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139 [2002]; *see also Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Those circumstances are "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm';(2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140 [internal citations omitted]; *see also Church*, 99 NY2d at 111-112; *Megaro v Pfizer, Inc.*, 116 AD3d 427 [1st Dept 2014]).

"As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" (*Glover v John Tyler Enters., Inc.*, 123 AD3d 882, 882 [2d Dept 2014]; *see also Diaz v Port Auth. of NY & NJ*, 120 AD3d 611, 612 [2d Dept 2014]). Where the contractor shows that it "did precisely what it was obligated to do under the

contract, [the party opposing summary judgment must] raise an issue of fact [as to] whether [the contractor] performed its contractual obligations negligently and created an unreasonable risk of harm to plaintiff, for whose injuries it could be held liable" (*Miller v City of New York*, 100 AD3d 561, 561 [1st Dept 2012]; *see also Fernandez v 707, Inc.*, 85 AD3d 539, 541 [1st Dept 2011]; *Agosto v 30th Place Holding, LLC*, 73 AD3d 492, 493 [1st Dept 2010]).

Open and Obvious

"If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn a visitor of the danger" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004], *citing Tagle v Jakob*, 97 NY2d 165 [2001] italics omitted; *see also Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014]). "However, the question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious when . . . the hazard or dangerous condition was of such a nature that it could not have been overlooked by a person with the ordinary use of their senses" (*Juoniene v H.R.H. Constr. Corp.*, 6 AD3d 199, 200 [1st Dept 2004] *see also Centeno v Regine's Originals*, 5 AD3d 210, 211 [1st Dept 2004]).

Put another way, a condition that is "readily observable by anyone employing the reasonable use of their senses [is] open and obvious" (*Wachspress v Central Park Sys. of N.Y., Inc.*, 111 AD3d 499, 499 [1st Dept 2013]; *see also Zhao v Brookfield Office Props., Inc.*, 128 AD3d 623, 624 [1st Dept 2015]; *Philips v Paco Lafayette LLC*, 106 AD3d 631, 632 [1st Dept 2013]). The burden is on the defendant to establish that the hazard or dangerous condition is readily observable or open and obvious (*see Zhao*, 128AD3d at 623; *Powers*, 123 AD3d at 422). "A wheel stop or concrete parking lot divider which is clearly visible presents no unreasonable risk of harm" (*Cardia v Willchester Holdings, LLC*, 35 AD3d 336, 336 [2d Dept 2006]; *see also Bogaty v Bluestone Realty NY, Inc.*, 145 AD3d 752, 752-753 [2d Dept 2016]; *Abraido v 2001 Marcus Avenue, LLC*, 126 AD3d 571, 571 [1st Dept 2015]; *Bellini v Gypsy Magic Enters., Inc.*, 112 AD3d 867, 868 [2d Dept 2013]).

Discussion

Initially, the plaintiffs' contention that the breach of the obligation under the Contract for the attendant at the Garage to bring out the Car imposes liability cannot be sustained since "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal*, 98, NY2d at 138). Moreover, to the extent that this imposes a duty greater than ordinary care, breach of this rule "cannot serve as a basis for imposing liability" (*Gilson*, 5 NY3d at 577).

As the movants, defendants have the burden to establish their contention that the Wheel Stop was open and obvious and, therefore, was not a hazardous or dangerous condition (*see Zhao*, 128AD3d at 623; *Powers*, 123 AD3d at 422). In these motions, defendants have presented the Photograph, which has been identified as a fair and accurate representation of the Wheel Stop and the Car, taken by Robert five minutes after the accident, and the deposition

testimony of Debra and Robert that they did not look at the floor behind the Car (Debra EBT at 40-41, 105-106; Robert EBT at 44-45).

Although the issue of whether a condition is open and obvious is usually a matter for a finder of fact to resolve (*see Juoniene*, 6 AD3d at 200; *Centeno's*, 5 AD3d at 211), defendants have established that the Wheel Stop was "readily observable" (*Wachspress,* 111 AD3d at 500) and "clearly visible" (*Cardia*, 35AD3d at 336). Accordingly, they have established their prima facie entitlement to judgment as a matter of law. In opposition, Debra's affidavit that states that her view of the Wheel Stop "was blocked" contradicts her deposition testimony that she did not look at the floor behind the Car and it therefore "creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Burkoski*, 40 AD3d at 383). The claim of optical illusion is also unavailing in light of Debra's deposition testimony that she did not look at the floor behind the Car. While Debra did not see the Wheel Stop before she took a step backwards and fell on it, this does not alter the fact that the Wheel Stop was in plain view and able to be seen. Therefore, defendants' motion for summary judgment dismissing plaintiffs' complaint must be granted.

Accordingly, it is

ORDERED that the motion of Zipcar, Inc., pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint, together with any cross claims, against it is granted, the complaint is dismissed as against it, together with costs and disbursements, as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion of 88th Garage Corp. and Geloda/Briarwood Corp., pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and any cross claims against them is granted, the complaint is dismissed as against them, together with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

9/17/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE