DiBenedetto v 460 Old Town Rd. Owners Corp.
2019 NY Slip Op 34329(U)
September 11, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 17-601905
Judge: Martha L. Luft

SHORT FORM ORDER

INDEX No. 17-601905
CAL. No. 18-01280OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 12-4-18
ADJ. DATE 4-23-19
Mot. Seq. # 001 - MG; CASEDISP

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PAUL DIBENEDETTO,

Plaintiff,

- against -

460 OLD TOWN ROAD OWNERS CORPORATION,

Defendant.

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers dated October 30, 2018 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers dated January 22, 2019 ; Replying Affidavits and supporting papers dated January 28, 2019; it is,

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

Plaintiff Paul DiBenedetto commenced this action to recover damages for injuries he allegedly sustained on July 13, 2016, when he fell down an interior staircase of the premises, a cooperative apartment, located at 460 Old Town Road, Apartment 25P, Port Jefferson, which is owned by defendant. Plaintiff alleges, among other things, that the staircase constituted a dangerous condition on the premises, in that it lacked proper handrails, and that defendant was negligent in its construction, installation and maintenance of the stairwell, and in failing to repair or warn of such condition.

Defendant now moves for summary judgment dismissing the complaint, arguing that there is no evidence the staircase constituted a dangerous condition on the premises, that the alleged condition was trivial and not actionable, that the rubber nosing was open and obvious, and that it had no notice of the alleged defective condition. In support of its motion, defendant submits copies of the pleadings, the bill of particulars, photographs of the stairwell, and transcripts of the parties' deposition testimony.

Plaintiff opposes the motion, arguing that triable issues of fact exist as to whether defendant had notice of a defective condition, whether the color of the handrail matched the color of the wall, and whether defendant violated Multiple Dwelling Law § 52 (1). Plaintiff also asserts that defendant failed to present evidence of the last prior inspection of the stairwell. In opposition, plaintiff submits his affidavit, an affidavit of his daughter, and color photographs of the stairwell. In reply, defendant argues that as plaintiff failed to address or oppose defendant's arguments regarding the steps, such claims should be deemed abandoned, that plaintiff's affidavit contradicts his testimony and should not be considered, that plaintiff failed to allege or establish that the violation of any specific code is applicable, and that plaintiff's claim regarding inspections is irrelevant.

At his examination before trial, plaintiff testified that on the incident date he was visiting his daughter who lived on the second floor of defendant's premises. He testified that the only way to access the apartment was by using the stairs, which he previously traversed between 50 to 80 times, without ever tripping or falling. Plaintiff testified that on the incident date he was ascending the stairs while carrying a shop-vac in his left hand, and holding the handrail with his right hand. He testified that there were 17 steps in the stairwell, and that when he was on approximately the sixth step, he realized he forgot an attachment at the bottom of the stairs. He testified that as he began to turn around on the step to retrieve it, his right hand was still on the handrail, his foot got caught, he tripped on the rubber nosing located on the edge of the stair and fell to the ground. Plaintiff testified that he could not recall seeing the rubber nosing prior to his fall, but that he saw it afterward. He further testified that he did not observe anything different about the nosing on the sixth step, and that it was not loose, jarred or missing any pieces. Plaintiff testified that he never previously tripped on the rubber nosing and that he was unaware of whether anyone else was previously injured on that stairwell.

At his examination before trial, Wayne Bolger testified that he began working as the maintenance superintendent of 460 Old Town Road in 2013 and that one other employee works under him. He testified that the staircase in building 25 of the complex is comprised of steel with a carpet overlay with rubber treads on the edges of the steps, and that there is one handrail on the right side of the stairwell when looking up the stairs. Bolger testified that during the time he worked at the premises, he was not aware of any alterations to the stairwell. He testified that if there were any concerns or complaints about the facility, residents would notify him and the appropriate action would be taken. He also testified that if he or his worker notice something out of place or damaged, then they would either fix it or call the appropriate person to fix it. Bolger testified that he could not recall exactly when the last date prior to the accident that he would have observed the stairwell, but that if there were a complaint about the stairway, it would be noted in the work log book. He testified that he was not aware of any prior complaints made about the stairway.

In her affidavit, Erica DiBenedetto avers that she is plaintiff's daughter and resided at the subject premises. She stated that she made multiple complaints prior to her father's fall about the safety of the staircare in the apartment complex and complained that there was only one handrail. She further averred that the color of the handrail was the same color as the wall to which it was annexed and difficult to see.

In his affidavit, plaintiff avers that when he fell, he was not holding the handrail, that the rubber nosing caused him to lose his balance, and that there was nothing in his hands when he lost his balance.

He stated that as he fell, he reached for the one handrail but was unable to grab it, and that because he was unable to grab a handrail he fell. He also stated that if there had been a second handrail, or if the one handrail were easier to see, he believes that he would not have fallen.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law (***see Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense" (***George Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]). If the moving party meets this burden, the burden then shifts to the opposing party, who must demonstrate evidence of the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure of the moving party to make this prima facie showing requires denial of the motion (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Since the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

An owner or possessor of real property has a common law duty to maintain such property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the potential injury, and the burden of avoiding the risk (***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). To establish liability in a trip-and-fall action, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). In addition to notice, the plaintiff must also demonstrate that the alleged dangerous condition was the proximate cause of his or her injury (*see* ***Dapp v Larson***, 240 AD2d 918, 659 NYS2d 130 [3d Dept 1997]). Where a plaintiff is unable to give a specific reason for the cause of an alleged accident he or she may not recover based on pure speculation (*see* ***Hunt v Meyers***, 63 AD3d 685, 879 NYS2d 725 [2d Dept 2009]; ***Visconti v 110 Huntington Assoc.***, 272 AD2d 320, 707 NYS2d 884 [2d Dept 2000]; ***Barland v Cryder House***, 203 AD2d 405, 610 NYS2d 554 [2d Dept 1994]).

Defendant established its entitlement to summary judgment as a matter of law by submitting evidence demonstrating that plaintiff was unable to identify a defective condition which caused him to fall (*see* ***Mantzoutsos v 150 St. Produce Corp.***, 76 AD3d 549, 907 NYS2d 34 [2d Dept 2010]; ***Varrone v Dinaro***, 209 AD2d 508, 619 NYS2d 79 [2d Dept 1994]). Plaintiff's own testimony revealed that there were no breaks, missing or loose pieces to the rubber nosing on the stairs, and that he believed it was the sixth step upon which he tripped. He speculated that his foot got caught on the rubber nosing. The testimony also revealed that he was holding onto the handrail with one hand when he turned and tripped. Moreover, plaintiff traversed the same stairs between 50 to 80 times without incident prior to the accident date, and never previously complained to defendant about the stairwell. The burden, therefore, shifted to plaintiff to raise a triable issue as to whether the stairwell was defective, whether defendants'

alleged negligence in maintaining it was a proximate cause of plaintiff's accident and whether there was notice of it (*see* ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31; *see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The mere happening of an accident does not establish liability of a defendant for negligence (*see* ***Scavelli v Carmel***, 131 AD3d 688, 15 NYS2d 214 [2d Dept 2015]; ***Foley v Golub Corp***, 252 AD2d 905, 676 NYS2d 308 [3d Dept 1999]). Absent evidence that defendant's alleged negligence was a proximate cause of plaintiff's accident, there can be no liability (*see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Here, plaintiff testified that he believed his sneaker got caught on the rubber nosing on the edge of the sixth step, but was not certain exactly which step, and that none of the rubber nosings were otherwise missing, torn or loose.

Plaintiff's submissions in opposition failed to show that other possible causes for the fall, like a simple misstep or loss of balance, were sufficiently remote (*see* ***Deal v Woods***, 48 AD3d 1093, 851 NYS2d 772 [4th Dept 2008]; ***O'Connor v Lakeview Assocs., LLC***, 306 AD2d 518, 761 NYS2d 858 [2d Dept 2003]; ***Collins v City of New York***, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]; ***Holliday v Hudson Armored Car & Courier Serv.***, 301 AD2d 392, 753 NYS2d 470 [1st Dept], *lv dismissed in part, denied in part* 100 NY2d 636, 769 NYS2d 196 [2003]; *cf.* ***Stanojevic v Scotto Bros. Rest. Enters.***, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). Plaintiff's self-serving affidavit that "I was not holding the one handrail" and that I "sincerely believe that had there been a second handrail, or indeed if the one handrail had been easier to see, I would not have fallen" is insufficient to defeat summary judgment, and is regarded as an attempt to raise a feigned factual issue so as to avoid the consequences of his earlier testimony that he was holding the handrail when he fell, and that there no problems with the rubber nosing (*see* ***Capasso v Capasso***, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; ***Krohn v Melanson***, 298 AD2d 510, 748 NYS2d 658 [2d Dept 2002]; ***Capraro v Staten Is. Univ. Hosp.***, 245 AD2d 256, 664 NYS2d 826 [2d Dept 1997]). Likewise, Erica DiBenedetto's affidavit that she complained multiple times about the lack of a second handrail is speculative and tailored to meet a desired result which is insufficient to defeat summary judgment. Lastly, plaintiff's assertion that defendant violated Multiple Dwelling Law § 52 is insufficient to defeat summary judgment, since this alleged violation was not set forth in his complaint or bill of particulars, is raised for the first time in his opposition, and is otherwise improper for consideration (*see* ***Fox v Patriot Saloon***, 166 AD3d 950, 88 NYS3d 483 [2d Dept 2018]; ***Metzger v Wyndham Homes Inc.***, 81 AD3d 795, 916 NYS2d 641 [2d Dept 2011]). Even so, plaintiff's claim is unsupported by any proof that defendant's premises was required to have a second handrail, or that the absence of it was the proximate cause of his injuries.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: 9/11/19

Martha L. Cfe
A.J.S.C.
HON. MARTHA L. LIFF

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION