

Fitzpatrick v Affairs & Banquets Floral Servs., Inc.
2019 NY Slip Op 34605(U)
September 30, 2019
Supreme Court, Westchester County
Docket Number: Index No. 67980/2016
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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EILEEN FITZPATRICK,

Plaintiff,

DECISION & ORDER
Index No. 67980/2016
Motion Sequence 3

-against-

AFFAIRS & BANQUETS FLORAL SERVICES, INC. dba
ARCADIA FLORAL COMPANY; CHURCH OF THE
ANNUNCIATION and MICHELE FITZPATRICK.,
Defendants.

-----X
AFFAIRS & BANQUETS FLORAL SERVICES INC dba,
ARCADIA FLORAL CO.

Plaintiff,

-against-

MICHELE FITZPATRICK,

Defendant.

-----X
The following papers were read and considered in connection with the defendant's motion for summary judgment:

Notice of Motion/Affirmation/Exhibits A-M	1-15
Affirmation in Opposition to Cross-Motion ¹	16

Procedural and Factual Background

The plaintiff, Eileen Fitzpatrick, commenced this action on November 30, 2016 against the defendants, seeking damages for alleged injuries sustained on July 9, 2016, when she alleges that she tripped and fell on a runner in the center aisle at the conclusion

¹The plaintiff's cross-motion papers were also considered to the extent it opposed the motion, but not with regard to seeking summary judgment.

of her granddaughter, Michele Fitzpatrick's wedding ceremony at Our Lady of Fatima s/h/a Church of the Annunciation ("the Church"), located at 470 Westchester Avenue, Tuckahoe, New York.

The defendant, Affairs & Banquets Floral Services, Inc. d/b/a Arcadia Floral Company ("Arcadia"), now moves for summary judgment pursuant to CPLR 3212, to dismiss the complaint and any cross-claims against it, arguing that Arcadia has demonstrated that there is no evidence of any defect regarding the floor runner or any negligence in its placement and Arcadia did not manufacture or set up the floor runner, but merely provided it in its original package for the bridal party to roll out. Thus, there is no evidence of any duty owed to the plaintiff by Arcadia, nor evidence that Arcadia breached any duty to her

The plaintiff filed a cross-motion for summary judgment in opposition, but such motion was denied in its entirety by Decision and Order (Lefkowitz, J.), finding that the plaintiff's motion was untimely and the plaintiff did not seek an extension, nor offer any reason why the motion was untimely nor why the lateness should be excused. The Court will only consider the parts of that motion that oppose the defendants' motions and not those parts seeking affirmative relief for summary judgment, as such was deemed untimely. No other defendant filed any opposition to Fitzpatrick's motion for summary judgment.

The plaintiff argues in opposition that the runner was a dangerous and defective instrumentality sold into commerce with knowledge of its dangerous propensities by the florist to Fitzpatrick, who had no instructions as to how to use the runner and a Church,

which completely failed to supervise Fitzpatrick's wedding and the runner's installation. The plaintiff argues that a jury reasonably would conclude that the defendants created a dangerous condition.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "[T]he proponent of a summary judgment motion 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," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. (See e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden shifts to the party opposing the motion to show the existence of material issues of fact by producing evidentiary proof, in admissible form, in support of their position.

In a slip-and-fall case, a defendant moving for summary judgment has the initial burden of establishing, prima facie, that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it, (*Sawicki v GameStop Corp.*, 106 AD3d 979; *Armijos v Vrettos Realty Corp.*, 106 AD3d 847, 847; *Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 1308).

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d

546, 546 [2d Dept 1995]), the Court finds that Arcadia has met its burden for summary judgment. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the runner was in a defective condition prior to the plaintiff's fall and whether Arcadia created such condition or breached a duty to the plaintiff.

Arcadia has demonstrated that it neither created the condition that allegedly caused the plaintiff's fall nor had actual or constructive notice of the alleged condition. The plaintiff in this case, alleges that there is no requirement for Arcadia to have notice because it created the condition by selling a defective runner to the defendant, Fitzpatrick and did not ensure that it was properly unrolled.

However, as noted by Arcadia, the plaintiff failed to provide any expert evidence to establish that the runner was defective and created a dangerous condition. The condition of the runner was open and obvious and as a matter of law, was not inherently dangerous (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). Also, the photographs that the plaintiff rely upon are not authenticated and there is no indication that the photographs show the runner in the area where the plaintiff fell. The plaintiff also failed to establish that Arcadia had a duty to be present at the Church to unroll the runner.

With regard to allegations that a defective runner was placed in the stream of commerce by Arcadia, no such allegation is made in the plaintiff's summons and complaint.

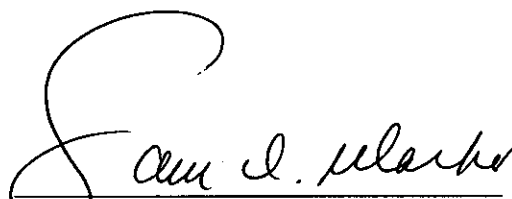
Accordingly, based on the foregoing, it is

ORDERED that the motion is GRANTED.; and it is further

ORDERED that all claims in the complaint and all cross claims against Affairs & Banquets Floral Services, Inc. d/b/a Arcadia Floral Company, are dismissed.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2019


HON. SAM D. WALKER, J.S.C.