Giordano v Castoldi
2019 NY Slip Op 34783(U)
April 10, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 601237/17
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:
Hon. Carmen Victoria St. George
Justice of the Supreme Court

SHARON GIORDANO,

Plaintiff,

-against-

DONALD CASTOLDI a/k/a DONALD CISCO,

Defendant.

Index No. 601237/17

Motion Seq: 001 MD
Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	10
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Defendant's/Respondent's.....	

The defendant seeks summary judgment dismissal of the complaint, alleging that he bears no liability for the happening of the incident that gives rise to this action. Plaintiff opposes the requested relief.

Plaintiff is defendant's mother, and she seeks to recover damages for injuries she sustained when she fell on defendant's property on September 16, 2016. Defendant rents the premises located on the subject property to two tenants. Plaintiff lives in close proximity to the subject property, and she fell as she was minding defendant's tenant's dog. Plaintiff alleges that she tripped on a piece of wood negligently permitted to be present on or near a walkway on defendant's rental property.

The defendant maintains that he is entitled to summary judgment dismissal of the complaint because the admissible evidence fails to establish a *prima facie* case of negligence against defendant. Specifically, defendant claims that it is pure speculation that the piece of wood caused plaintiff's fall. Instead, defendant argues that plaintiff was already falling forward

because the dog was pulling her, and she never mentioned the piece of wood to defendant after the accident. Defendant further argues that plaintiff cannot establish that he created any alleged defective condition, or that he had actual or constructive notice of same.

"The Supreme Court's function on a motion for summary judgment is issue finding, not issue determination" (***Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Public Accountants, LLP***, 164 AD3d 864, 865 [2d Dept 2018]). Also, where credibility is a "key factor" in the motion papers, denial of the motion is required (***Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:6***, at 14; ***Donato v. ELRAC, Inc.***, 18 AD3d 696 [2d Dept 2005]; ***Frame v. Markowitz***, 125 AD2d 442 [2d Dept 1986]).

Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]), and the Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

Of course, the defendant is charged with the duty to maintain the subject premises in a reasonably safe condition (***Katz v Westchester County Healthcare Corp.***, 82 AD3d 712, 713 [2d Dept 2011]), and it is well-settled that a defendant property owner in a slip/trip-and-fall case has the initial burden of making a *prima facie* showing that it neither created the dangerous condition nor that it had actual or constructive notice of the condition for a sufficient length of time to discover and remedy it (***Morahan-Gick v. Costco Wholesale Corp.***, 116 AD3d 747 [2d Dept 2014]; ***Lee v. Port Chester Costco Wholesale***, 82 AD3d 842 [2d Dept 2011]). "This burden cannot be satisfied merely by pointing out gaps in the plaintiff's case" (***DeFalco v. BJ's Wholesale Club, Inc.***, 38 AD3d 824, 825 [2d Dept 2007]), as defendant does in the instant motion.

To be entitled to summary judgment in a trip and fall case, a defendant is required to show, *prima facie*, that he or she maintained the premises in a reasonably safe condition and that he or she did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (***Villano v Strathmore Terrace Homeowners Assn., Inc.***, 76 AD3d 1061 [2d Dept 2010]). Specifically with respect to constructive notice, a defendant must tender some evidence establishing when the area in question was last cleaned or inspected prior to the plaintiff's fall (***Zambri v. Madison Square Garden***, 73 AD3d 1035, [2d Dept 2010]; ***Birnbaum v. New York Racing Association, Inc.***, 57 AD3d 598 [2d Dept 2008]). Reference to general cleaning or inspection practices is insufficient to establish a lack of constructive notice in the absence of evidence concerning specific cleaning or inspection of the area in question (***Rong Wen Wu v. Arniotes***, 149 AD3d 786, 787 [2d Dept 2017]).

In support of his motion, defendant submits, *inter alia*, the Bill of Particulars verified by plaintiff and the deposition testimony of the parties to this action. Defendant has not submitted for the Court's review any of the photographs that were shown to the plaintiff and defendant at their depositions and about which there was significant testimony.

In any event, it is established by defendant's own testimony that he has no practice as to routine inspections and maintenance of his rental property. At best, he testified that he "go[es] there once every few months," and that he would walk around the property "once every three months." He keeps no records of any kind regarding his inspections and/or maintenance of the property. When asked when he last walked around the property prior to September 16, 2016, defendant replied, "I don't remember." According to defendant, his brother and mother live in a house on the next street, and the backyards of the subject rental property and the house where his mother and brother live abut each other. Defendant also testified that there is a means of egress between the backyards. Defendant does not consistently go to the subject property to collect the rents every month. Sometimes, the plaintiff collects the rents for defendant.

If there was something specific at the subject property that needed to be fixed, defendant testified that his brother and/or one of his tenants (Richard Schook) would tell him what needed fixing. Defendant also stated that neither his brother, nor the tenants at the subject property, have any responsibility for fixing anything; defendant has that responsibility. The tenants do, however, cut the lawn and rake the leaves on the subject property.

Further according to defendant, Richard Schook installed a wooden fence at the property because of Schook's dog, a bulldog. Defendant could not recall when the fence was installed, but Schook had the dog at the subject premises for approximately two years as of the date of plaintiff's fall. Apparently, Schook takes portions of the fence in and out of the ground when he needs to take his boat on and off the subject property for the season.

Concerning the piece of wood that plaintiff described as being "long, thin" and solid, depicted in a photograph shown to defendant at deposition (Exhibit H), defendant testified that had he been at the subject property and seen it, he "would have thrown it out, because I think it's garbage." He did not know where the wood came from, whether or not it was present on the date of his mother's accident, and he did not know if that piece of wood was present when he first observed that the wooden fence had been installed by his tenant, Schook. He also testified that he did not observe whether or not any construction materials were left around the area where the fence had been installed.

When asked how long the board depicted in Exhibit H had been there prior to his mother's accident, he stated that he "didn't know it was even there. I've never seen it." He further testified that he never saw that piece of wood on the property at any point until he saw it in the photograph shown to him. He also stated that he went to the subject property after he learned of his mother's accident, but he did not see the board there. There is no indication in defendant's testimony as to when exactly he went to the subject property after the accident. Defendant also stated that his mother never told him about any wood. According to him, his mother told him "that the dog saw another dog and pulled her, and she fell down in the driveway;" she never told him that she tripped over a piece of wood that was in the yard of the subject property.

In contrast to defendant's testimony, plaintiff testified that on her second visit to the subject property to take care of Schook's dog, at approximately 6:30 p.m., she exited the yard with

the dog on the leash. She passed through the wooden gate to get to the side door, when the dog started running. Plaintiff had closed and latched the wooden gate behind her and she had taken only two or three steps toward the side door when the dog began to pull her. The "skinny" piece of wood was approximately eight inches in front of her once she shut the wooden gate behind her. The piece of wood was on the ground and ran parallel to the fence. Plaintiff identified two photographs (Exhibit G and H) as depicting the way the piece of wood looked on the day of her fall and its position with respect to the driveway. Exhibit H is apparently the same Exhibit H identified by defendant, and Exhibits G and H were described as being "very similar" to each other.

When asked if she stepped on the wood, or tripped on the wood, and/or what happened with the piece of wood, plaintiff described that she "tripped. I hit that, and the dog pulled me, and I went down." She also described that she "went through the gate; and the dog—as soon as I closed that gate, the dog just started pulling me. I know I hit that wood. I went down on my knees, my hand; and I let the dog go." She specified that her right foot hit the wood, which then caused her to "fall down." Accordingly, this testimony, raises an issue of fact regarding defendant's claim that it is pure speculation that the piece of wood caused plaintiff's fall.

Plaintiff was not sure if she took the same path to get back into the house on the second visit to the property as she did when she first went to the subject property at 11:00 a.m. on the date of her fall. When asked if she tripped over the piece of wood the first time she went to the property at 11:00 a.m., she stated "No." She testified that she "assume[d]" that the wood was also there earlier in the day.

Defendant's argument that "[p]laintiff has presented no evidence that the wood had been on the property for any length of time so that Defendant should have known about it" (Affirmation, ¶ 23) is unavailing because it improperly shifts the burden upon the plaintiff when the burden to establish *prima facie* entitlement to summary judgment as a matter of law rests squarely upon defendant's shoulders at this juncture. Although there is no evidence that defendant created the condition or had actual notice of its existence, defendant has failed to establish that he did not have constructive notice of the piece of wood located in the path of travel from the gate to the side door. He inspected his own property only once every three months, at best, kept no records as to inspections and/or maintenance, and relied upon his brother and tenants, who have no responsibility to fix the premises/property, to alert him to conditions requiring repair.

Moreover, the conflicting testimony of the plaintiff and the defendant present a "key factor" of credibility requiring denial of the motion. Defendant denies that his mother ever told him that she tripped over a piece of wood. Defendant also testified that he asked his brother what happened and his brother "didn't volunteer any information to me," but his brother said, "'[t]he dog pulled her, and she fell in the driveway.'" The questions of who to believe and what to believe concerning the happening of the accident giving rise to this action can only be answered by the trier of fact who will have the opportunity to see and hear the witnesses and assess their credibility.

Based upon the foregoing determinations, defendant has failed to establish his *prima facie* entitlement to summary judgment as a matter of law.

Defendant's motion is denied without the need to consider whether plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact (*see* ***Levin v Khan***, 73 AD3d 991 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581[2d Dept 2010]).

The foregoing constitutes the Decision and Order of this Court.

Dated: April 10, 2019
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]