

Santiago v Post Rd. Assoc., LLC
2019 NY Slip Op 34817(U)
June 28, 2019
Supreme Court, Westchester County
Docket Number: Index No. 50864/2017
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.

-----X
KIMBERLY SANTIAGO,
Plaintiff, DECISION & ORDER
Index No. 50864/2017
Motion Sequence 3
-against-

POST ROAD ASSOCIATES, LLC and UNICORN
CONTRACTING CORP.,
Defendants.

-----X
UNICORN CONTRACTING CORP.,,
Third-Party Plaintiffs,

-against-
WHITE PLAINS HOSPITAL,
Defendant.

-----X

The following papers were received and considered in connection with the defendants' motion for summary judgment:

Notice of Motion/Affirmation/Exhibits A-N	1-16
Affirmation in Opposition/Exhibits A-E	17-22
Affirmation in Opposition/Exhibit A	23-24
Reply Affirmation	25

Factual and Procedural Background

The plaintiff, Kimberly Santiago ("Santiago") commenced this action by filing a summons and complaint on January 20, 2017, to recover monetary damages for a trip and fall accident that occurred on August 2, 2016, on the interior staircase of 101 East Post

Road, White Plains, New York. The defendant, Unicorn Contracting Corp. ("Unicorn")

commenced a third-party action against the third-party defendant, White Plains Hospital Medical Center ("WPH")¹.

On the day of the accident, Santiago was an employee at WPH and worked Monday through Friday from 8:00 a.m. to 4:00 p.m. She testified that she worked on the third floor of the building where the accident occurred and slipped on the landing of the second floor as she was going down the stairs. She testified that she was told that a metal bracket caused her to trip and fall.

Post Road Associates, LLC ("Post Road"), now moves for summary judgment to dismiss the complaint, pursuant to CPLR 3212, arguing that Post Road is an out of possession owner and had no obligation to maintain the premises. Post Road further argues that it had no notice of any dangerous condition.

In support of its' motion, the defendants rely upon, among other things, an attorney's affirmation, the parties' deposition testimony, affidavits, a copy of the lease, a letter with regard to occupancy and copies of the pleadings.

In opposition, Santiago, by her attorney, argues that Post Road has failed to make a prima facie showing of entitlement as it has not shown that it did not create and/or have notice of the condition and it did not show when the staircase was last cleaned nor inspected. Santiago further argues that a metal hinge caused her to fall and she saw workers in the staircase prior to her fall and the staircase was in a generally dirty condition and it was Post Road's responsibility to maintain it. Santiago also asserts that the witness

¹Post Road states that it commenced a third-party action, but there is no record of a third-party summons and complaint being filed by Post Road.

Steven Giamundo cannot establish a prima facie case, as he does not know when the area was last cleaned and inspected and he was not present on the morning of the accident. Santiago also argues that Post Road is not entitled to summary judgment, because the lease agreement states that the landlord is responsible for the common areas of the building, which would include the staircase.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law (*see 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” (*see 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]) and the burden shifts to the party opposing the motion, who must then show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of their position (*Id.*).

To impose liability upon a defendant in a slip-and-fall case, a plaintiff has to put forth evidence showing the existence of a dangerous or defective condition and 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, (*see Davis v Sutton*, 136

AD3d @ 732-733; *Sawicki v GameStop Corp.*, 106 AD3d 979; *Armijos v. Vrettos Realty*

Corp., 106 AD3d 847; *Freiser v Stop & Shop Supermarket Co., LLC*, 84 A.D.3d 1307, 1308). "To constitute constructive notice, a defect must 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" (*Kane v Peter M. Moore Const. Co., Inc.*, 145 AD3d 864 [2d Dept 2016]).

In this case, there is no evidence that anyone, including Santiago, observed the metal hinge prior to her accident. It "could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation" (see *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

In addition, Post Road asserts that it is an out of possession owner/landlord and therefore, is not liable for any defects. "An out-of-possession landlord is not liable for injuries that occur on its premises unless it retains control over the premises or is contractually bound to repair unsafe conditions" (see *Lalicata v 39-15 Skillman Realty Co., LLC*, 63 AD3d 889, 890[2d Dept 2009]). "Control may be evidenced by lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises" (*Ever Win, Inc. v 1-10 Industry Associates, LLC*, 33 AD3d 845, 846 [2d Dept 2006]).

Paul Guilaro, who owns 50% of Post Road and is the owner of Unicorn and submitted an affidavit stating that Post Road entered into a lease agreement with WPH to perform a build; that in May 2013, a letter of substantial completion was provided to WPH, which acknowledged full occupancy of the premises and took full and complete possession of the premises on July 1, 2016; that pursuant to the lease agreement, WPH

was responsible for cleaning, repairs and maintenance inside the building, including the interior stairwells of the premises. Ossie T. Dahl, the administrative director of engineering services for WPH also submitted an affidavit stating that WPH took full possession of the premises at least one month prior to Santiago's accident and pursuant to the lease, was responsible for, among other things, cleaning, repairs, and maintenance inside the building, including the interior stairwells.

Santiago contends that Article 5 of the lease agreement states that the landlord was responsible for the maintenance of the stairs and that the tenant shall pay the landlord monthly operating costs incurred in operating managing, repairing and maintaining the property, including maintenance and repair of any stairs. Santiago further asserts that Article 14, paragraph 14.03 of the lease states that the landlord is responsible to maintain, repair and replace all common areas, which would include the stairs. However, although the lease does have these provisions, Santiago testified that she learned that she tripped on a metal bracket. The metal bracket was not part of the staircase and there is no allegation that it was. So the maintenance of the staircase is not a factor.

Further, the clause of the Article 14 of the lease agreement clearly states in paragraph 14.01, that:

Tenant shall, at its expense, take good care of the Premises, the fixtures and appurtenances therein and any Tenant's Property. Tenant shall be responsible for and shall promptly make all repairs, interior and exterior, structural and nonstructural, ordinary and extraordinary, in and to the Premises and the Building the need for which arises of (a) the performance or existence of any Alterations or other work by Tenant, (b) the installation, use or operation of Tenant's Property, (c) the moving of Tenant's Property in or out of the Premises or the Building, Or (d) the act, omission, misuse or neglect of or by Tenant or any subtenant or licensee, or their respective employees, agents, contractors or invitees. Tenant at its expense shall

promptly replace all scratched, damaged or broken glass in and about the Premises and shall be responsible for all repairs, painting, maintenance and replacement of wall and floor coverings in the Premises.

Paragraph 14.03 states that notwithstanding anything to the contrary, the landlord shall maintain, repair and replace the structural elements of the Building and Premises, including the common areas. The plaintiff has failed to show that the alleged defect was structural in nature. The cause of Santiago's fall, as per her testimony, was not a structural defect, but instead a metal bracket on the staircase landing.

Additionally, WPH acknowledges that it was in full possession and occupancy of the Premises prior to Santiago's accident on August 2, 2016 and that pursuant to the lease agreement WPH was responsible for cleaning, repairs and maintenance inside the building.

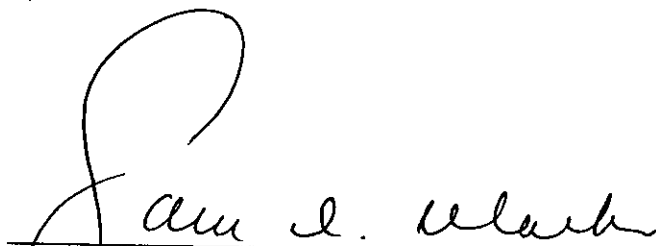
Accordingly, it is

ORDERED that Post Road's motion for summary judgment is granted; and it is

ORDERED that all claims and cross-claims against Post Road are dismissed.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
June 28, 2019


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