Ventura v Cherry Lane Assets LLC
2020 NY Slip Op 30582(U)
February 27, 2020
Supreme Court, New York County
Docket Number: 154996/2017
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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YENILI VENTURA,

Plaintiff,

- v -

CHERRY LANE ASSETS LLC,THE PARKOFF ORGANIZATION, PARKOFF OPERATING CORP.

Defendant.

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INDEX NO. 154996/2017

MOTION DATE 07/19/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is denied.

Plaintiff commenced this action claiming that on September 4, 2016, she slipped and fell on a stairway inside of the apartment building in which she is a tenant. She asserts that her slip and fall was due to a "recurrent and long-standing hazardous debris condition, which consisted of chicken bones and a lot of liquid and napkins on the steps". The building is owned by defendant, Cherry Lane.

All defendants now move for summary judgment arguing that they neither created the alleged dangerous condition, nor had any notice of its existence and to the extent that a dangerous condition existed, they had no duty to protect against its open and obvious nature. It should be noted that depositions of all of the parties have been taken.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). The party moving for summary judgment must make a showing of

entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact. *Winegrad v. New York Univ Med. Ctr.* 64 NY2d 851 (1985). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Smalls v. AJI Indus. Inc.,* 37 AD3d 324 (2007). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce proof in evidentiary form sufficient to establish the existence of material issues of fact that require a trial for resolution." *Giuffrida v. Citibank Corp.,* 100 NY2d 81 (2003).

When deciding a motion for summary judgment, the Court's role is solely to determine if triable issues exist, not to determine the merits of any such issues. *Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 (1957). The Court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Negri v. Stop & Shop, Inc.,* 65 NY2d 625 (1985). If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *Rotuba Extruders Inc., v. Ceppos,* 46 NY2d 500 (1978).

It is well established that, before a defendant can be found liable for negligence, the plaintiff must prove that the defendant owed a duty of care and that this duty was breached. *Panso v. Triboro Coach Corp.,* 172 AD 813 (1991). Duty is, "a question of whether a defendant is under any obligation for the benefit of the particular plaintiff." Whether a defendant owes a duty to the plaintiff." *Wiera v. Ettco Wire Cabe Corp.,* 172 AD 813 (1994).

In the case at bar defendant's motion is denied because plaintiff has demonstrated that questions of fact exist which preclude summary judgment. Specifically, plaintiff has established that the "recurrent and long-standing nature" of the hazardous condition which occasioned her fall, calls into question defendant's constructive notice of the condition's existence. *Butler v.*

Helmsley Spear. Inc., 198 AD2d 131 (1993). It has been held that, where a defendant causes or permits a temporary slippery condition to exist, there may be liability—which issue is for the jury to decide. There must be some evidence in the record tending to show that defendant had constructive which allegedly caused injuries to a plaintiff". *Lewis v. Metropolitan Transportation Authority*, 99 AD2d 246. Here the record contains such evidence, via the deposition testimony of plaintiff and a neighbor, that this was not the first time that the stairway had been littered with debris which calls into question defendants constructive notice as the condition of the stairway. Defendants have failed to rebut plaintiff's claim of actual and/ or constructive notice by offering any evidence, in admissible form, outlining when and how often the stairs were cleaned and inspected. *Rodriguez v Board of Education of the City of New York,107AD3d 651.*

A defendant must provide evidence of more than just its generalized cleaning procedures in order to challenge a claim of constructive notice of a defect. Here, defendants have failed to meet that challenge by not providing any evidence as to whether such cleaning procedures exist and if they do, whether such procedures were followed. Further, a showing of a general cleaning procedures is insufficient to satisfy a burden of establishing that at property owner lacked notice of the alleged condition. *Yioves, v. T. J. MAXX, Inc.*, 30AD3d 284

The deposition testimony of the Mr. Hector Carrasco, the building superintendent did not produce any credible evidence regarding any particularized or specific inspection or stair-cleaning procedure in the area of plaintiff's fall or the date of plaintiff's fall. It has been held that the failure to indicate when the area had been last inspected or cleaned is fatal to a property owner's motion for summary judgment.

Plaintiff has also raised an issue as to whether the defendants are liable for a recurrent hazardous condition. The depositions of plaintiff and the non-party witness call into question

whether the accumulation of trash in the stairway was a dangerous and frequently unremedied recurring condition that caused plaintiff's injury. *Irizarry v. 15 Mosholu Four, LLC,* 24 AD3d 373.

The courts have also concluded that where there is an absence of direct evidence of actual or constructive notice, a jury can infer constructive notice from a photograph. The only requirement is that the pictures depicting the defect be taken close in time to the alleged incident, and that there be testimony that the defect be depicted accurately to represent the accident-causing defect. *Amaral v. Metro-North Commuter R.R.,* 7 Misc3d 1006 A.

Plaintiff, through photographs, identified the condition of the stairs at the time she was caused to fall, which call into question defendants' constructive notice of the stairway condition. The visibility of the subject hazard has been sufficiently demonstrated to raise a triable issue as to whether defendant had constructive notice of the claimed defect. *Knightner v. Custom Winsow & Door Pads,* 289 AD2d 455.

The Court has reviewed the remaining arguments and to the extent not discussed herein will not be addressed.

As plaintiff, in opposition to defendant's summary judgment motion, has demonstrated that issues of fact exist and therefore need to be decided by a jury, the motion is denied,

This is the Order of the Court.

2/27/2020
DATE

W. FRANC PERRY, J.S.C.

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