SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

SUSANNE BOTFELD

INDEX NO. 159615/2016

MOT. DATE

- v -

MOT. SEQ. NO. 005

FRIENDS OF HUDSON RIVER PARK et al.

The following papers were read on this motion to/for partial SJ

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is a personal injury action. Plaintiff moves for partial summary judgment on liability against defendant Hudson River Park Trust ("HRPT"). HRPT opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The facts are as follows. On May 24, 2016, at approximately 7:00 P.M., a restroom stall door on defendant's premises came loose and struck plaintiff. Plaintiff contends that defendants negligently maintained the door and had actual and constructive notice of the dangerous condition of the hinge prior to the occurrence.

Plaintiff had used the same bathroom previously without incident. The door was attached to the stall farthest on the right out of three stalls in the restroom. At her 50-h hearing, she testified that immediately prior to the accident, she noticed that the door was "wobbily" or something was not right but decided to use the stall anyway because she "had to go really badly". Plaintiff explained that the side of the door with the lock on it swung into her, striking her as she crouched over the toilet. Plaintiff admitted that she may not have locked the latch on the door all the way.

After the accident, plaintiff called for help. An EMT arrived, but plaintiff refused to go to the hospital and ultimately took the bus home. A few weeks after the accident, plaintiff was diagnosed with a right hip fracture. Plaintiff alleges that the accident caused her right hip injury as well as exacerbation of preexisting back injuries.

William Rettig, the Senior Director of Facilities at HRPT, appeared for a deposition. He testified as follows. HRPT maintains the Hudson River Park located west of Route 9A, from Battery Park City up to

Dated: 8/17/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

59th Street. HRPT is responsible for maintaining the restroom where plaintiff's accident occurred. While the restroom is cleaned by an independent contractor, HRPT's Facilities and Maintenance staff make all necessary repairs. Rettig claimed that HRPT would only learn that a repair was needed if the cleaning contractor notified it.

Rettig claimed that a complaint about the restroom would have been logged into HRPT's computer system, and it would be repaired within a few days thereafter. Two days prior to plaintiff's accident, HRPT received a report that a door was off the hinges in the restroom. A technician was assigned to repair the door and on May 23, 2016, the day, before plaintiff's accident, a second work order indicates that the case was "closed."

According to Rettig, the restroom door which fell on plaintiff weighed about 30 to 40 pounds and was held above ground by hinges. If the door was broken, the cleaning crew would hang a sign indicating that the door should not be used. Rettig further testified:

Q. Other than posting a sign on the stall to warn of the public not to use it, would anything else be done, tape put. on or some kind of barricade put on the stall?

A. It might occasionally. Depending on the condition.

Q. What would be done?

A. Caution tape, perhaps.

Q. What condition or conditions would necessitate caution tape being applied to the stall?

A. A perceived unsafe condition.

Q. Would a stall door off its hinge or loosened stall door be a situation that would necessitate caution tape?

A. Generally speaking I would say yes.

When asked about the two work orders created in the days before plaintiff's accident, Rettig stated:

A. So in this system, this indicates when the work order was actually closed in the system, it does not necessarily mean when the work was completed.

Q. But the fact that it was closed, does that mean that work was completed?

A. Yes, absolutely. …

Q. Can you tell from this document when the actual work was done?

A. I cannot for sure, but since it was scheduled to start and scheduled to end on the 23rd and the status was closed on the 23rd, I can assume the work was done on the 23rd.

Q. But you don't know?

A. I don't know for a fact, no.

Dwayne Cremona, another HRPT employee, appeared for a deposition. He confirmed the work orders and testified that he assigned the work orders to Carl Harper to complete. Eddie Bruce also appeared for a deposition on behalf of defendant. Bruce is a Facilities Technician and immediately reported to the scene of plaintiff's accident after it occurred. At that time, Bruce saw that the bottom of the stall door was hanging out but the top was stable. Plaintiff told him that the door had had her.

Carl Harper testified at a deposition on behalf of the defendant as well. Harper is a Maintenance Technician. He testified that he knew of problems with the stall door, specifically the hinge, prior to plaintiff's accident. When asked if he had ever repaired the door before, Harper stated "I believe so but I'm not sure…" Harper estimated that the door weighed 70 to 75 pounds.

Harper further stated that the stall door had a "piano" hinge the length of it with a pin that should have gone the length of the door. When asked what caused the door to fall, Harper said:

Q. Okay. What came apart here to cause the door to fall?

A. The pin.

Q. So would it have been a pin problem, or something else?

A. A pin problem.

Q. Okay. Can you describe the problem was with the pin?

A. It was either missing or broken.

Q. Okay. So on the prior instances when you had problems with the door or how to repair the door was it also a pin problem?

A. Yes.

Q. And was there a difficulty in getting those pins?

A. I believe so, yes.

Q. And so when you had to make the repairs in the past did have you to continue to try to make do with the pin you had?

A. Yes, I believe it was a yes f believe it was some type of wire, or metal rod in place.

Q. In replace of the pin?

A. Yes.

Q. Okay. So you were using a wire or a metal rod in place of the pin that actually the hinge called for?

A. Yes.

Q. Okay. And that was you had utilized to try to attached to the frame, is something that keep the door that correct?

A. Yes.

Q. Okay. But the pins were no longer available?

A. No.

Plaintiff maintains that she has demonstrated entitled to summary judgment on liability on this record. Meanwhile, defendant argues at length about plaintiff's injuries, contending that there is no proof that her claimed injuries resulted from the underlying accident. Defendant points to IME reports by Dr. Ronald Grelsamer, an orthopedist, and Dr. Kevin Toosi, a biomechanical engineer. The former opines that plaintiff's right hip femoral neck stress fracture could not be caused by an acute or traumatic injury such as the underlying accident, but rather "is the result of normal stresses applied to bone an excessive number of times (e.g. stress foot fractures in long distance runners), or excessive stresses repeatedly placed on normal bone (military march fractures), or normal stresses applied to abnormal bone (e.g. bones with osteomalacia and/or osteoporosis). Dr. Grelsamer asserts that the fact that plaintiff did not seek urgent treatment is evidence that she was suffering from a stress fracture. He further claims that "[a]ad the alleged incident not brought the stress fracture to light, the fracture would have gone on to a being a displaced fracture, a much higher-level injury that can lead to a hip replacement." Dr. Grelsamer further concludes that plaintiff will not suffer from posttraumatic arthritis as a reulst of the accident, either.

Meanwhile, Dr. Kevin Toosi opines that the force of the door falling onto plaintiff "provided no mechanisms or loads for a lumbar spinal injury or exacerbation of any existing lumbar spinal pathology that Ms. Botfeld might have before the accident." Toosi maintains that plaintiff's claimed injuries are degenerative in nature and "cannot reasonably be attributed to the accident."

Aside from attempting to raise a triable issue of fact as to whether plaintiff's injuries were a proximate cause of her accident, defendant argues that there are jury questions as to whether the unsafe condition of the stall door was open and obvious and whether defendant had sufficient notice.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

There can be no dispute on this record that HRPT created the unsafe condition which caused plaintiff's accident by failing to fix the stall door and install a proper pin in its hinge. Instead, Harper admitted that he used "a wire or a metal rod in place of the pin" and as a result, the hinge failed. Therefore, plaintiff has established that HRPT created the unsafe condition which caused her accident.

In turn, defendant has failed to raise a triable issue of fact as to its negligence. Its arguments on notice of unavailing, since it created the unsafe condition. Nor has defendant raised a triable issue of fact as to whether the condition was open and obvious. Even if it had, such an argument would only bear on a claim that there was a failure to warn, an argument which plaintiff has not raised herein.

However, defendant has raised a jury question on whether its negligence was a substantial factor in causing plaintiff's claimed injuries. A reasonable factfinder could conclude, based upon HRPT's IME doctors' opinions, that the injuries which plaintiff claims she sustained were not caused by the accident. Rather, her claimed injuries could have been caused by a preexisting degenerative condition and/or a jury could conclude that the accident was not a "substantial factor" in causing plaintiff's injuries. Therefore, plaintiff's motion is granted only to the extent that she is entitled to summary judgment on the issue of whether the defendant was negligence. All other issues, including whether defendant's negligence was a substantial factor in causing plaintiff's injuries, remain for trial.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that she is entitled to summary judgment on the issue of whether the defendant was negligence. All other issues, including whether defendant's negligence was a substantial factor in causing plaintiff's accident, remain for trial; and it is further

ORDERED that plaintiff's motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 8/17/20
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.