Crawford v 77 Conklin Corp.
2020 NY Slip Op 33400(U)
October 14, 2020
Supreme Court, Kings County
Docket Number: 523469/2017
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

JACQUELINE CRAWFORD,

Plaintiff,

-against-

77 CONKLIN CORP. d/b/a THOMAS JEFFERSON DEMOCRATIC CLUB and HENRY BOLUS,

Defendants.

X

DECISION/ORDER

Index No. 523469/2017
Motion Seq. Nos. 1 and 2
Date Submitted: 09/17/2020

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendants' motion for summary judgment and plaintiff's motion for summary judgment.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, Affidavits and Exhibits Annexed…….	26-44, 46-70
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	
Reply Affirmation.....	77, 78

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Defendants move for summary judgment (MS #1) dismissing the complaint in this personal injury action. Plaintiff moves for partial summary judgment (MS #2) on the issue of liability. For the reasons that follow, both motions are denied.

Background

On August 5, 2017, plaintiff went to a baby shower for her friend Stephanie Woodford's niece. It was held at 77 Conklin Avenue, Brooklyn, NY, a property owned by defendant 77 Conklin Corp., a NY business corporation. The corporation could not have been "doing business as" The Thomas Jefferson Democratic Club, as stated in the caption, as the latter is a NY not-for-profit corporation. In any event, she testified that when she was leaving the party, she entered the vestibule, leaned on the exit door with her left arm and

"stepped out with her right foot" and "there was nothing there and [her] leg went down" (E-File Doc 31 at 62 [plaintiff's EBT]). She states that she fell onto the sidewalk. Earlier in her EBT, she testified that she ambulated with a cane and that she had severe arthritis, which had caused her to previously stop working, as she could not walk up and down the subway stairs (*id.* at 30).[1] She was going for physical therapy for her knees for some period of time prior to the accident. In her complaint, it is alleged that the plaintiff fell "due to a raised entrance creating a large gap between the entrance and the sidewalk" at the premises. Defendants claim she fell after she had left the premises, and not because of any dangerous condition at the premises, perhaps because of her "bad" knees.

Valerie Woodford, the host of the party, testified that she witnessed the accident. She said that she opened the door for plaintiff, who exited the building and did not lose her balance and fall until after she had both feet on the sidewalk (E-File Doc 34 at 109-110 [Woodford's EBT]). She said that you cannot open the door by leaning on it, as you have to turn the doorknob, which she had done for the plaintiff. Ms. Woodford testified that she offered to help plaintiff step down, but plaintiff declined the offer and said, "I got it" (*id.* at 104). She further testified that plaintiff was not using her cane, which was hung over her right arm as she left the building (*id.* at 103). Melinda Crawford, plaintiff's daughter, had left the building first in order to get her car. Melinda Crawford was waiting outside and witnessed the accident. She testified that plaintiff put her cane down first, then was "on the ground" (E-File Doc 37 at 92-93 [Crawford's EBT]). Henry Bolus, listed on the NYS Department of State website as the CEO of defendant property owner, was not present at the time of the party and thus did not witness the accident.

[1] Her attorney confirms in his affirmation that plaintiff was receiving Social Security Disability at the time of the accident.

Defendants claim that the complaint should be dismissed as plaintiff knew of the allegedly dangerous "condition" when she entered the building, because she testified that she remembered that to enter, one had to take one step up. Therefore, she should have known that when she left, she had to take one step down. In the alternative, defendants argue the complaint should be dismissed because defendants had no actual or constructive notice of a dangerous or hazardous condition. Putting it more artfully, which is not how it is written by defendants' (former) counsel, defendants assert that the building entrance was not defective or dangerous; that the condition alleged by plaintiff was open and obvious; that defendants had no notice of any defective condition; and that plaintiff's expert's claims, of code violations and that the building exit lacked appropriate optical cues that there is a step at the location, lack merit.

Defendants also urge the court to agree that the Americans With Disabilities Act is inapplicable, as it does not provide a private right of action for damages. There is no mention in the motion that the complaint should be dismissed as against Henry Bolus, the individual defendant, and the court cannot do so *sua sponte*, but there does not seem to be a basis for a claim against him.

The court notes that the only cause of action in the complaint is for negligence, and that the ADA does not provide a private right of action for damages (*see Charnoff v Baldwin Realty Group, Inc*., 8 Misc 3d 1023[A], 2005 NY Slip Op 51252[U] [Sup Ct, Nassau County 2005]). Therefore, plaintiff may not make a claim under the ADA in this lawsuit.

Defendants support their motion with an affirmation from counsel, the pleadings, EBT transcripts for four people,[2] photos, and expert affidavits prepared by both plaintiff's expert

[2] Plaintiff, defendant Bolus, plaintiff's daughter, and Valerie Woodford, the party host who witnessed the accident.

and defendants' expert.[3] Defendants' expert (Paul Morris P.E.) refutes the arguments of plaintiff's expert one by one, concluding that the cited code sections are inapplicable or post-date the building's certificate of occupancy, that the other standards (i.e., ASTM) are not laws, codes, rules or regulations, and that the one step at the building entrance does not violate the 1938 NYC Building Code, which is the only version of the NYC Building Code that applies to this building (E-File Doc 40, ¶ 9).

Plaintiff supports her motion with the same items. Plaintiff contends she is entitled to summary judgment on the issue of liability and (incorrectly) an inquest on damages.[4] Counsel claims that the entrance to the building was defective, as "no handrails guardrails, landings or ramps were present to assist 'Club' visitors." He also avers that the lighting was inadequate. Plaintiff does not submit any opposition to defendants' motion, instead contending that the same facts support her motion for summary judgment. She claims that her expert's affidavit, which describes the design of the entrance and claims that the building entrance violates various building codes and architectural standards, and that the lighting at the building entrance is inadequate, make a prima facie showing.

Plaintiff's counsel urges the court to grant plaintiff summary judgement, dramatically stating in his affirmation in support of her motion (E-File Doc 47):

> "[D]eparting guests, not guided by interior visual cues justifiably had no reason to recognize the sidewalk was not flush with 'The Club' interior. The absence of these security devices [handrails, guardrails, landings or ramps] was a critical safety hazard for 'Crawford' on the night of her accident. As she placed her right foot out of the premises not anticipating the impending vertical sidewalk drop, she futilely reached out for a phantom handrail. There was no way to regain her balance. She crashed into the sidewalk, her body grossly contorted, suffering significant injuries."

[3] Defendants use the report in plaintiff's CPLR §3101 (d) exchange, while plaintiff uses her expert's affidavit.

[4] Summary judgment on liability would not deprive defendants of a full trial on damages.

Defendants do not oppose plaintiff's motion, treating it as a cross motion, and submit a reply. As noted, plaintiff does not oppose defendants' motion, treating its own motion as a cross motion, and also submits a reply.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus be employed only when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment **as a matter of law** by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]) [emphasis added]. If a movant fails

to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851 [1985]).

If a movant meets the initial burden, parties opposing the motion for summary judgment must tender evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a motion for summary judgment are entitled to "every favorable inference from the parties' submissions" (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Indeed, in deciding a motion for summary judgment, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to the non-moving parties (*Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]).

Furthermore, "[i]n all but the most extraordinary instances, whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial" (*St. Andrew v O'Brien*, 45 AD3d 1024, 1028 [3d Dept 2007] [internal quotation marks omitted]; *see also Ferrer v Harris*, 55 NY2d 285, 291-292 [1982]; *Andre*, 35 NY2d at 364; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833, 833 [3d Dept 1989]; *Kiernan v Hendrick*, 116 AD2d 779, 781 [3d Dept 1986]). Lastly, "[a]

motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' " (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

In order to prove negligence, plaintiff must demonstrate that defendant property owner either created or had notice (actual or constructive) of an allegedly dangerous condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]). Here, the conflicting expert affidavits are decisive in determining that the motions cannot be granted. While conflicts between parties' expert's affidavits will not create an issue of fact where an affidavit contradicts the evidence in the record or is speculative, that is not the case with these motions (*see Dasent v Schechter*, 95 AD3d 693, 693 [1st Dept 2012]). Here, plaintiff's expert claims that the entrance/exit to the building violates numerous sections of the NYC Building Code. But defendants' expert states that plaintiff's expert's affidavit lacks probative value because plaintiff's expert cites inapplicable code sections and standards that are not legal requirements. He then states affirmatively that the entrance/exit door is not hazardous and does not violate the applicable NYC Building Code, the 1938 Code.

Expert affidavits which present conflicting opinions raise issues of fact and credibility determinations that cannot be resolved on a motion for summary judgment (*Ocampo v Boiler*, 33 AD3d 332 [1st Dept 2006]; *Bradley v Soundview Healthcenter*, 4 AD3d 194, [1st Dept 2004]). The court cannot determine issues of credibility, nor can it decide which expert is correct on the issue of whether or not a condition violates the

NYC Building Code (*see Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 315 [2004] ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment"] [internal citations omitted]; *see also Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["It is not the court's function on a motion for summary judgment to assess credibility"]; *Scott*, 294 AD2d at 348).

Here, not only do the experts disagree with each other, plaintiff's description of the accident is quite different from that of defendant's eyewitness, Valerie Woodford. It is not possible for the court to grant either side summary judgment. Plaintiff's expert, an architect, claims the configuration of the entrance, plus the lack of sufficient lighting, combined with the way the mind works while walking, results in the conclusion that the building entrance/exit was hazardous. Defendant's expert, an engineer, says there is nothing wrong with the entrance/exit, which is not hazardous and does not violate any applicable NYC Building Code sections. Further, plaintiff's counsel claims that Mr. Bolus' testimony supports plaintiff's claim that the owner had actual notice of the hazardous condition, as he acknowledged at his EBT that the democratic club, which apparently leases the premises or a part of it, had (before plaintiff's accident) discussed possible ways to improve the entrance/exit for people with mobility impairments. Defendants' counsel not only claims that there is no hazardous condition, and notes that a discussion of improvements is not acknowledgement of a hazardous condition, but that plaintiff has not proven that the step was the proximate cause of her accident. He argues that it is more likely that the arthritis in her knees caused her to fall. Neither of these motions for summary judgment can be granted, given that both plaintiff's and

defendants' submissions in support of their respective motions fail to eliminate all issues of fact.

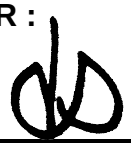
Accordingly, it is

ORDERED that both motions are denied.

This constitutes the decision and order of the court.

Dated: October 14, 2020

ENTER:



Hon. Debra Silber, J.S.C.