

Victor v Luna Park Hous. Corp.
2020 NY Slip Op 34174(U)
December 11, 2020
Supreme Court, Kings County
Docket Number: 501168/2018
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of DECEMBER, 2020

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

-----X
VERONICA M. VICTOR,

Plaintiff,
-against-

Index No.: 501168/2018
Decision and Order

LUNA PARK HOUSING CORPORATION and METRO
MANAGEMENT & DEVELOPMENT, INC.

Defendants,

-----X
The following papers NYSCEF Doc #'s 47 to 73 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	47-66
Opposing Affidavits (Affirmations)_____	69-70
Reply Affidavit (Affirmations)_____	72-73

After having heard Oral Argument on OCTOBER 14, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant moves pursuant to CPLR 3212 for summary judgment alleging the plaintiff is unable to identify what caused her to fall, and pursuant to CPLR 204 and 32112(a) for an order extending defendants time to move for summary judgment nunc pro tunc until 120 days after all outstanding discovery is completed. (MS#3). Plaintiff opposes the same.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v. Zeh*, 45 Misc2d 93 [Sup Ct, Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well

as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2d 557 [1990]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 NY2d 1019 [1995]).

“Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation” (*Ash v City of New York*, 109 AD3d 854, 855 [2013] [citations omitted]; see *Kudrina v 82-04 Lefferts Tenants Corp.*, 110 AD3d 963, 964 [2013]).

In the present case, contrary to defendants contention, the plaintiff during her deposition clearly identified the defective condition which caused her to fall. Plaintiff testified she fell on water that was accumulating during a rain storm in a corridor of a building that was exposed to the elements. Additionally, contrary to defendants contention that the plaintiff cannot identify the cause of her fall, not only does the plaintiff testify numerous times that she fell on water, their own maintenance employee ALLEN ABRAHAM testified he was called to clean up the water after the plaintiff fell. Additionally, the defendants' have failed to provide proof of when the area was last cleaned, or any report of the incident as required by their own practice and procedure see EBT of defendant witness SUSCO regarding “rainy day procedure”. Therefore, the

plaintiff has a raised a triable issue of fact as to whether the defendants had notice or created the hazardous condition that caused plaintiff's injuries. Moreover, all of these contentions raise questions of fact as to both parties' credibility. Credibility is solely for the jury (*Sorokin v. Food Fair Stores*, 51 AD2d 592, 593, 378 NYS2d 492, 493; *Pertofsky v. Drucks*, 16 AD2d 690, 227 NYS2d 508; *Ellis v. Hoelzel*, 57 AD2d 968, 968, 394 NYS2d 91, 93 (1977)). As such, issues of fact and credibility of the parties remain and are best left for a jury.

Next the court shall address defendants request to extend their time to file for summary judgment. All summary judgment motions are subject to the single motion rule. The current application before the court is a motion for summary judgment. Therefore, defendant request to extend time to file for summary judgment is hereby denied as they have already filed for summary judgment.

Accordingly, defendant motion pursuant to CPLR 3212 for summary judgment is hereby denied. Defendant request to extend time to file for summary judgement is also denied. (MS#3).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
December 11, 2020



HON. RICHARD VELASQUEZ