Fuentes v Fisher
2020 NY Slip Op 34730(U)
May 4, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 613927/2018E
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Maria Fuentes,

Plaintiff,

-against-

Carol Fisher,

Defendant.

Carol Fisher,

Third-Party Plaintiff,

-against-

Ada Celia Ramos,

Third-Party Defendant.

Clerk of the Court

Motion Sequence No.: 002; MG
Motion Date: 1/30/2020
Submitted: 2/5/2020

Index No.: 613927/2018**E**

Attorney for Plaintiff:

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Attorney for Defendant/Third-Party Plaintiff Carol Fisher:

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Third-Party Defendant:

Ada Celia Ramos
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Upon the **E-file document list** numbered 48 to 70 read on the motion by defendant/third-party plaintiff Carol Fisher for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint; it is

ORDERED that the motion by defendant/third-party plaintiff for summary judgment is granted (CPLR 3212).

Plaintiff Maria Fuentes commenced this personal injury action against defendant Carol Fisher alleging that on November 30, 2017 she was injured when she fell down the stairs of premises owned by defendant. The action was commenced by the filing of a summons and complaint on July 19, 2018. Issue was joined on December 18, 2018. Plaintiff alleges that Fisher was negligent in her ownership, operation, management and control of the stair located at 55 Lieper Street, Huntington Station, Suffolk, New York (the "subject premises") in that she caused or allowed and permitted certain dangerous conditions consisting of defective stairs, that she created the condition in that she caused plaintiff's fall by either placing improper carpet over the steps leading to and from the upstairs premises and improperly secured same, and that defendant had actual or constructive notice in that defendant was at the premises on a regular basis and either installed or directed the installation of the dangerous condition, and witnessed the dangerous condition or should have witnessed it and took no measures to correct it. On February 1, 2019, defendant Carol Fisher commenced a third-party action against the tenant of the subject premises, third-party defendant Ada Celia Ramos, seeking indemnification and/or contribution in the event plaintiff recovers damages against third-party plaintiff Fisher. Third-party plaintiff Fisher claims that third-party defendant Ramos placed carpeting on the subject stairs, which was loose and not secured to the stairs. A default judgment was granted against third-party defendant Ramos by order dated August 13, 2019. Defendant now moves for summary judgment dismissing the complaint. Defendant submits in support of her motion, an attorney affirmation, a copy of the pleadings, a copy of the verified bill of particulars, the lease agreement, the deposition transcripts of plaintiff, defendant, and non-party Charles Fisher, the rental permit certificate, and photographs. In opposition, plaintiff submits an attorney affirmation, the deposition transcripts, and photographs. Defendant replies.

According to the lease, non-party Charles Fisher leased the subject premises, which was owned by defendant Ms. Fisher, to third-party defendant Ada Ramos. It is undisputed that plaintiff Ms. Fuentes is not named as a tenant in the lease and that she and Arnaldo Ramos moved into the subject premises in October 2016 and rented a room on the second floor.

Plaintiff testified at her examination before trial that she resided at the subject premises for a year with her partner Arnaldo Ramos, that this is where she was residing when the fall occurred, that Ada Ramos was "in charge of the house", and that she would pay rent to Ada Ramos not defendant or Mr. Fisher. Plaintiff further testified that she and Arnaldo Ramos had their own bedroom, and that Ada resided at the subject premises with her two daughters, her son, her grandchildren and her nephew. Plaintiff testified that she did not know who laid the green carpeting on the top of the stairs where carpeting already existed, that the green carpeting was there when she moved in, that plaintiff told Ada Ramos about the carpeting being loose but she did nothing to repair it, that plaintiff never mentioned the stairs or carpeting to non-party Charles Fisher on the two occasions when she saw him at the subject premises to collect rent from Ada Ramos, and that she and Arnaldo Ramos took pictures of the stairs immediately after she fell.

Defendant Carol Fisher testified at her examination before trial that the subject premises was her family home until 1982 when she began renting it. Defendant further testified that her husband, Charles Fisher, would handle the rentals and sign the lease. Defendant testified that she had been at

the subject premises just prior to the date when Ada Ramos moved in and supervised the cleaning of the carpets and the painting. Plaintiff further testified that beige carpeting was installed on the stairs about twelve or thirteen years ago and that no repairs were done to the beige carpeting prior to Ada Ramos moving in. Plaintiff testified that Ada Ramos never made any prior complaints regarding the carpeting on the staircase and the house passed an inspection by the Town of Huntington and was certified as a rental property. Plaintiff further testified that she had never seen plaintiff Ms. Fuentes prior to the date of her deposition. When shown pictures depicting the green carpeting on the stairs, plaintiff testified that she was unaware that green carpeting had been placed on the stairs, that she had no knowledge as to who placed it there, that she had never seen the green carpeting on the stairs before, and never directed anyone to put green carpeting on top of the beige carpeting. Plaintiff further testified that she had never received any complaints that any of the tenants had slipped and fallen on the stairs prior to November 30, 2017.

Non-party Charles Fisher testified at a deposition that he rented the subject premises to Ada Ramos, that every two years the town inspects the property to renew the rental permit, that an inspection was performed on October 22, 2017, and no defects were raised by the town. Mr. Fisher further testified that he would advise Ada Ramos when he was coming to pick up the rent and she would walk it out to him. Mr. Fisher testified that prior to Ms. Ramos occupying the subject premises, he had the rugs cleaned and that he had no reason to enter the subject premises as no issues were raised by the tenants. Mr. Fisher further testified that he had never received any complaints about carpeting being loose and when he was shown photographs of the green carpeting on the stairs, he testified that he had never seen it before and never directed anyone to place the green carpeting on the stairs. Mr. Fisher further testified that after the accident he inquired of Ms. Ramos about the green carpeting and she told him that Jose Bardales put it there.

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). "[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (***Lopez-Serrano v. Ochoa,*** 149 AD3d 1063, 1063, 52 NYS3d 480 [2d Dept 2017], quoting ***Foster v. Herbert Slepoy Corp.,*** 76 AD3d 210, 214, 905 NYS2d 226). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (***Winegrad v. New York Univ. Med. Ctr.***, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v. Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see* ***Chimbo v. Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v. Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v. Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept

2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v. Bolivar***, *supra*; ***Benetatos v. Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

"Although a jury determines whether and to what extent a particular duty was breached, it is for the court to first determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally" (***Cupo v. Karfunkel***, *supra*, quoting ***Tagle v. Jakob***, 97 NY2d 165, 168, 737 NYS2d 331 [2001]). A landowner must maintain his or her property in a reasonably safe condition considering all of the circumstances, such as the likelihood and seriousness of injury to others and the inconvenience of avoiding the risk (***Cupo v. Karfunkel***, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003]; *see* ***Basso v. Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). Whether a dangerous condition exists on real property generally is an issue to be determined by the jury based on the unique facts of each case (***DeLaRosa v. City of New York***, 61 AD3d 813, 877 NYS2d 439 [2d Dept 2009]; *see* ***Trincere v. County of Suffolk***, 90 NY2d 976, 977, 655 NYS2d 615 [1997]).

"[A]n owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition" (***Bolloli v. Waldbaum, Inc.***, 71 AD3d 618, 619, 896 NYS2d 400 [2d Dept 2010], quoting ***Curiale v. Sharrotts Woods, Inc.***, 9 AD3d 473, 474-475, 781 NYS2d 47 [2d Dept 2004]). Constructive notice requires "[the] condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it" (***Bolloli v. Waldbaum, Inc.***, *supra*, quoting ***Deveau v. CF Galleria at White Plains, LP***, 18 AD3d 695, 769 NYS2d 119 [2d Dept 2005]; *see* ***Gordon v. American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). A defendant seeking summary judgment in a trip-and-fall case bears the burden of establishing, prima facie, that he or she neither created nor had actual or constructive notice of the alleged defective condition (*see* ***Mandarano v. PND, LLC***, 2018 NY Slip Op 00133 [2d Dept 2018]; ***Jackson v. Jamaica First Parking, LLC***, 91 AD3d 602, 936 NYS2d 278 [2d Dept 2012]). "An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct" (***Crosby v. Southport, LLC,*** 169 AD3d 637,639, 94 NYS3d 109 [2d Dept. 2019]; ***Washington-Fraswer v. Industrial Home for the Blind,*** 164 AD3d 543, 83 NYS3d 503 [2d Dept. 2018] *quoting* ***Duggan v. Cronos Enters., Inc.,*** 133 AD3d 564, 564, 18 NYS3d 555 [2015]; ***Mendoza v Manila Bar & Rest. Corp.,*** 140 AD3d 934, 935, 33 NYS3d 448 [2d Dept 2016]; ***Salaices v. Gar-Ben Assoc.,*** 82 AD3d 740, 918 NYS2d 510 [2d Dept. 2011]; ***Santos v. 786 Flatbush Food Corp.,*** 89 AD3d 828, 932 NYS2d 525 [2d Dept. 2011]). "Even if a defendant is considered an out-of-possession landlord who assumed the obligation to make repairs to its property, it cannot be held liable for injuries caused by a defective condition on the property unless it either created the condition or it had actual or constructive notice of it" (***Washington-Fraswer v. Industrial Home for the Blind***, *supra*).

Here, defendant established her prima facie entitlement to summary judgment in that she did not create the allegedly defective condition nor did defendant assume a duty in the lease or through a course of conduct ensure against an alleged defective or dangerous condition caused or created by the actions of a third-party in placing green carpeting on top of fully carpeted stairs. Moreover, the stairs leading up to the second floor were fully covered in beige carpeting and thus it was not foreseeable that someone would place a second carpet over the fully carpeted stairs. Further, according to plaintiff's own testimony, defendant did not retain sufficient control over the conditions which allegedly caused plaintiff's accident so as to subject her to liability (***Crosby v. Southport, LLC,*** 169 AD3d 637, 94 NYS3d 109 [2d Dept. 2019]; ***Dodkowitz v. Nelson,*** 22 AD3d 709, 803 NYS2d 131 [2d Dept. 2005]). Indeed, the Fishers had no knowledge of the green carpeting having been placed on the stairs and even if they were aware of the carpeting, they had neither actual nor constructive notice that the green carpeting was loose or otherwise dangerous. All parties admit that no complaints were made to the Fishers regarding the condition of the stairs or any carpeting on the stairs. By plaintiff's own admission, she addressed her complaints about the loose green carpeting to Ada Ramos, not defendant or Mr. Fisher. Accordingly, defendant established that she did not create the alleged dangerous condition nor did she have actual or constructive knowledge of it (*see* ***Figueroa v. Gueye,*** 66 AD3d 638, 887 NYS2d 166 [2d Dept. 2009]).

In opposition, plaintiff failed to raise a triable issue of fact and, thus, summary judgment is warranted in favor of defendant (*see* ***Chalouh v. Lati, LLC,*** 144 AD3d 621, 39 NYS3d 827 [2d Dept 2016]).

Accordingly, the motion by defendant for summary judgment dismissing the complaint is granted.

Dated: May 4, 2020

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION