

Kroenung v Blue Hill Commons Condominium
2020 NY Slip Op 34981(U)
May 1, 2020
Supreme Court, Rockland County
Docket Number: Index No. 034659/2017
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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JESSICA KROENUNG,

Plaintiff,

-against-

DECISION & ORDER

Index No.: 034659/2017

Motion Seq. No. 1

BLUE HILL COMMONS CONDOMINIUM, PETER
NASTASI MANAGEMENT and ADD VENTURES
CONSTRUCTION SERVICES, LLC,

Defendants.

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Sherri L. Eisenpress, A.J.S.C.

The following papers, were considered in connection with defendants Blue Hill Commons Condominium and Peter Nastasi Management’s Notice of Motion for an Order, pursuant to CPLR §3212, granting summary judgment in favor of defendants as against plaintiff and dismissing the complaint and all crossclaims:

Notice of Motion, Affirmation in Support by Michael Kestenbaum, Esq., Exhibits A-O, Affidavit of Peter Nastasi

Affirmation of Ira H. Lapp Esq., in Opposition, Exhibits A-D

Affirmation of Michael Kestenbaum, Esq., in Reply, Affidavit of Peter Nastasi, Exhibits A-E

Upon the foregoing papers, the Court now rules as follows:

HISTORY

Plaintiff commenced this personal injury action on September 26, 2017 (Exhibit A, NYSCEF Doc. 31). The amended summons and complaint were filed on January 23, 2019 (Exhibit C, NYSCEF Doc. 33). Plaintiff alleges that on May 7, 2017, at approximately 7:00 p.m., at the exterior stairway near Unit D of the premises located at 13 Blue Hill Commons, Orangeburg, New York, she was caused to sustain injuries due to the dangerous and defective stairway, stairway railing and lighting, which was without signs or warnings. (Exhibit H, NYSCEF Doc. 38).

Through counsel, defendants Blue Hill Commons Condominium and Peter Nastasi Management answered on November 22, 2017 (Exhibit B, NYSCEF Doc. 32). Defendants Blue Hill Commons Condominium and Peter Nastasi Management filed an answer to the amended summons and complaint on February 8, 2019 (Exhibit D, NYSCEF Doc. 34). Through counsel, defendant Add Ventures Construction Services, LLC (ADD) answered, with crossclaims on May 2, 2019 (Exhibit E, NYSCEF Doc. 35). Blue Hill Commons Condominium and Peter Nastasi Management filed an amended answer on June 7, 2019 (Exhibit F, NYSCEF Doc. 36) and filed an answer to ADD's crossclaims on June 7, 2019 (Exhibit G, NYSCEF Doc. 37).

INSTANT MOTION

Defendants Blue Hill Commons Condominium and Peter Nastasi Management move for summary judgment arguing that they did not have notice of the alleged condition that caused plaintiff's injury and therefore had no duty to plaintiff that would result in liability for plaintiff's injuries. Defendants argue that plaintiff resided near and passed the location of the alleged accident for years prior to, without incident, and never complained about the alleged defect. Defendants indicate that the property is inspected each spring and fall and provided proposals and an invoice for work performed near where plaintiff resided (Exhibits M and N, NYSCEF Docs 43 and 44). Defendants admit that the proposals and invoice do not specifically identify the work performed. According to defendants, plaintiff provided inconsistent testimony and evidence. Defendants submit photographs in which plaintiff circled the location and cause of her accident (Exhibit K, NYSCEF Doc. 41), which according to defendants, evidence that the accident could not have happened as plaintiff described and plaintiff's inability to establish what caused her to fall is fatal to her cause of action.

In opposition, plaintiff argues that in reviewing all the evidence and case law, there are triable issues of material fact with regard to defendants' actual and constructive notice of the uneven, depressed area that caused plaintiff's accident. Plaintiff argues that Peter Nastasi testified (Exhibit B, NYSCEF Doc. 50) that two months before the accident, the walkway section where plaintiff fell was earmarked for repair, and after the accident, the walkway section and defect were repaired (Exhibit D, NYSCEF Doc. 52).

In reply, defendants argue that plaintiff premised this action on the ownership, operation, maintenance and control of the stairway, yet none of the evidence proves that any portion of the stairway was involved in plaintiff's accident. Defendants contend that plaintiff's testimony that she stepped into a depressed area on the walkway and fell down the staircase is impossible, and according to defendants would require guesswork, speculation and conjecture to find liability against the defendants. Defendants reiterate that there are conflicting differences between the allegations in the complaint, bill of particulars, and plaintiff's testimony. Defendants concede that it is unknown if the condition plaintiff identified as the cause of her accident was included in the areas to be replaced during inspection.

DISCUSSION

The proponent of a summary judgment motion must sufficiently establish his or her claim or defense to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986). Admissible evidence sufficient to support that prima facie showing may include "affidavits by persons having knowledge of the facts [and] reciting the material facts" GTF Mktg. v. Colonial Aluminum Sales, 66 N.Y.2d 695, 697 (1985). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250 (2d Dept 2003). In determining such motion, this Court must "view the evidence in the light most favorable to the nonmoving party" Stukas v. Streiter, 83 A.D.3d 18, 22 (2d Dept 2011). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In a personal injury action premised on an owner's failure to maintain its property, "[a] landowner has a duty to maintain his or her property in a reasonably safe condition under the existing circumstances, and may be liable in tort if the plaintiff can establish that the

landowner either affirmatively created or had actual or constructive notice of a hazardous condition.” Austin v. Town of Southampton, 113 A.D.3d 711, 712 (2d Dept 2014); Walsh v. Super Value, Inc., 76 A.D.3d 371, 375 (2d Dept 2010). To meet its prima facie burden on the lack of constructive notice, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell. Rong Wen Wu v. Arniotes, 149 A.D.3d 786 (2d Dept 2017).

Here, defendants failed to meet the burden for summary judgment and their motion must be denied. Plaintiff testified at her examination before trial that the alleged defect existed for approximately one year prior to the accident (Exhibit A, NYSCEF Doc. 49, pp 61 – 62). It appears that defendants concede that plaintiff’s pictures show ordinary aging and wear and tear. While defendants may dispute the time of existence for the alleged defect, defendants have failed to provide evidence to dispute plaintiff’s claim. Instead, defendants have proffered evidence of an inspection and work scheduled to be performed that do not identify the location and defects to be corrected.

Further, for purposes of summary judgment, the Court must view the facts in the manner most favorable to Plaintiff. As such, even if defendants had met their burden on summary judgment, plaintiff has established a triable issue of fact as to whether a defective condition, a depressed walkway, existed at the time of the accident and whether defendants had constructive notice of same. Additionally, defendants’ arguments regarding the location of the alleged defect and plaintiff’s testimony about the cause and manner of her accident are issues of evidence, fact and credibility that are triable issues that should be before a jury.

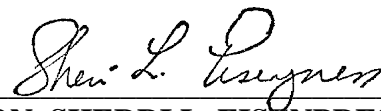
Accordingly, it is hereby

ORDERED the Notice of Motion filed by Defendants Blue Hill Commons Condominium and Peter Nastasi Management is DENIED in its entirety; and it is further

ORDERED that all parties are to appear in the Trial Readiness Part on WEDNESDAY, JUNE 24, 2020, at 9:30 a.m. for a conference.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
May 1, 2020



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO: All counsel via NYSCEF