

Bardio v Rego II Borrower LLC

2020 NY Slip Op 35383(U)

March 16, 2020

Supreme Court, Queens County

Docket Number: Index No. 713644/2017

Judge: Pam Jackman Brown

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.

NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

Short Form Order

Present: Hon. Pam Jackman Brown, JSC

-----X
**BRIDGIT BARDIO f/k/a BRIDGIT BARDIO-
WEBSTER,**

Plaintiff,

-against-

**REGO II BORROWER LLC d/b/a REGO CENTER
PHASE I & REGO CENTER PHASE II, REGO
CENTER SECURITY, VORNADO REALTY
TRUST, URBAN EDGE PROPERTIES,
ALEXANDER'S, INC., ALEXANDER'S REGO
SHOPPING CENTER, INC., and ANCHOR
BUILDING MAINTENANCE CORPORATION,**

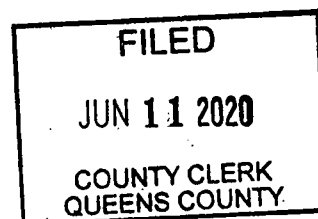
Defendants.

Index No.: 713644/2017

Motion Date: 10/28/2020

Cal. No.: 4

Mot. Seq. No.: 001



-----X
Recitation, as required by CPLR § 2219(a), of the following papers numbered 14 to 46 read on this notice of motion by defendants and cross motion by plaintiff for summary judgment on liability.

	<u>PAPERS NUMBERED</u>	
	Papers	Exhibits
Notice of Motion – Affirmation(s), Affidavit(s), and Exhibits Annexed	14–15; 27	16–26
Notice of Cross Motion – Affirmation(s), Affidavit(s), and Exhibits Annexed	29–30; 35	31–34
Opposition to Cross Motion – Affidavit and Exhibits	41; 45	42–44
Affirmation in Reply – Affidavits and Exhibits	36; 40; 46	37–39

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

On October 17, 2014, plaintiff was allegedly injured when she fell on an interior staircase of premises located at 61-35 Junction Boulevard, Queens County, New York, known as Rego Park Mall. According to plaintiff, at the time of the accident she was being escorted to her vehicle, at her request, by a security officer employed by the mall. She alleges that prior to the accident, the security officer had interrupted an argument between her and her husband and asked him to leave. She testified that she consumed alcoholic beverages prior to the accident and was intoxicated. Plaintiff commenced an action for damages against defendants on the basis that the accident occurred due defendants' negligent assumption of duty and failure to maintain the staircase in a reasonable safe and clean condition. She has since discontinued this action against defendant, Anchor Building Maintenance Corporation. The remaining defendants collectively seek dismissal of the complaint and cross claims and plaintiff cross-moves for summary judgment

It is well settled that a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of establishing that it did not create nor have either actual or constructive notice of any alleged dangerous condition for a sufficient length of time to discover and remedy it. (*See Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136 [2017]; *Zerilli v Western Beef Retail, Inc.*, 72 AD3d 681 [2d Dept 2010].) A defendant may also establish its prima facie entitlement to summary judgment by demonstrating that the plaintiff can not identify the cause of his fall. (*See Rodriguez v New York City Hous. Auth.*, 169 AD3d 947 [2d Dept 2019]; *Andersen v El Triunfo Laundromat Corp.*, 151 AD3d 921 [2d Dept 2017].) "A plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation". (*Belton v Gemstone HQ Realty Assoc., LLC*, 145 AD3d 840, 841 [2d Dept 2016]; *see Hahn v Go Go Bus Tours, Inc.*, 144 AD3d 748 [2d Dept 2016].)

Here, defendants seek summary judgment on the basis that plaintiff failed to identify a defective condition, as alleged in the complaint and bill of particulars. In support, they submit, inter alia, plaintiff's deposition testimony, wherein she denied observing any debris, liquid or a defective condition on the staircase. Although defendants have established the lack of a defective condition, inasmuch as they failed to address the remaining allegations of negligence pled in the complaint as one cause of action, issues of fact exist, precluding summary judgment. Plaintiff's claim includes the negligent assumption of a duty by a security officer, employed by defendants, in failing to escort her to her vehicle in a safe manner. However, defendants failed to establish their

prima facie entitlement to summary judgment on that theory of liability. Furthermore, their request for alternative relief, dismissing the complaint against defendants, Rego Center Phase II, Rego Center Security, Vornado Realty Trust, Urban Edge Properties, Alexander's Inc, and Alexander's Rego Shopping Center Inc., on the basis that they had no interest in the property, is denied. Defendants failed to establish their prima facie entitlement to such relief, as their application was not supported by any documentary evidence or an affidavit from anyone with personal knowledge.

Plaintiff cross-moves for summary judgment on the issue of liability, albeit untimely. The cross motion was admittedly made more than 120 days after the filing of the note of issue (*see Brill v City of New York*, 2 NY3d 648 [2004]), however, as the defendants' motion for summary judgment was timely, it will be permitted. (*See Travelers Indem. Co. v AA Kitchen Cabinet & Stone Supply, Inc.*, 106 AD3d 812 [2d Dept 2013]; *Snolis v Clare*, 81 AD3d 923 [2d Dept 2011]; *Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007].) An untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds, which are already before the court. (*See Giambona v Hines*, 104 AD3d 807 [2d Dept 2013]; *Snolis*, 81 AD3d 923; *Grande*, 39 AD3d 590.)

It is well settled that the elements of common-law negligence include the existence of a duty, a breach of that duty, and a showing that the breach of that duty was a proximate cause of the injury. (*See Roberson v Wyckoff Hgts. Med. Ctr.*, 123 AD3d 791 [2d Dept 2014]; *Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010]; *Ingrassia v Lividikos*, 54 AD3d 721 [2d Dept 2008].) Even when ordinarily there is no original duty, if a duty is undertaken by defendant, then it must be performed with "due care for the safety of plaintiff". (*See Kranenberg v TKRS Pub, Inc.*, 99 AD3d 767 [2d Dept 2012]; *Ruiz*, 71 AD3d 1112; *Kievman v Philip*, 84 AD3d 1031 [2d Dept 2011].)

In support of the cross motion, plaintiff submits, inter alia, the depositions of plaintiff and Israr Buhkari (Bukhari), the security director, on behalf of defendants; an incident report; an expert affidavit; and affidavit of plaintiff's husband. Plaintiff claims that defendants assumed a duty to escort her to her vehicle, but did not perform it with "due care for her safety". She testified that the security officer broke up a fight between her and her husband, and told him to leave. The security officer then agreed to help her find her vehicle and directed her to use the stairs, instead of the elevator, although he was aware that she was intoxicated. In his affidavit, plaintiff's husband states that he told the security officer that his wife was intoxicated and that "she's your problem now". However, these allegations are contradicted by the incident report and testimony of Buhkari, which sets forth that when the security officer encountered the plaintiff, she was upset because her husband had left her and needed assistance in finding her vehicle.

Although the security officer advised plaintiff to take the elevator to the parking level, she refused and took the stairs. As is the case here, 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". (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see *LeBlanc v Skinner*, 103 AD3d 202 [2d Dept 2012].) "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact". (*LeBlanc*, 103 AD3d 202, 212, citing *Gille v Long Beach City School Dist.*, 84 AD3d 1022 [2d Dept 2011].) Moreover, plaintiff's expert affidavit is conclusory and speculative and is thus, insufficient to demonstrate plaintiff's entitlement to summary judgment.

Accordingly, the motion and cross motion are denied.



Dated: March 16, 2020
Jamaica, NY

HON. PAM JACKMAN BROWN, JSC

FILED
JUN 11 2020
COUNTY CLERK
QUEENS COUNTY