

Hawkins v Foxy Mgt. Ltd.

2020 NY Slip Op 35457(U)

April 10, 2020

Supreme Court, Bronx County

Docket Number: Index No. 28163/2017E

Judge: Rubén Franco

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

JANICE HAWKINS,

Index No. 28163/2017E

Plaintiff,

-against-

**MEMORANDUM
DECISION/ORDER**

FOXY MANAGEMENT LTD,
EAST 138TH STREET OWNERS LLC and
BARRIER FREE LIVING HOUSING
DEVELOPMENT FUND CORPORATION,

Defendants.

Rubén Franco, J.

In this action to recover damages for personal injuries, plaintiff moves to vacate this court’s Order dated October 18, 2019, which granted summary judgment on default in favor of defendants on liability and, upon vacatur, to allow plaintiff to submit opposition papers. Defendants oppose the motion on the ground that plaintiff fails to show a reasonable excuse and a meritorious claim.

The facts as stated in this court’s October 18, 2019 decision are as follows:

While walking the hallway of defendants’ premises, where she resided, plaintiff slipped, but did not fall, when she stepped in water that had accumulated outside of the entrance of a neighboring apartment. In her deposition, plaintiff testified that the water was the result of her neighbor, non-party Jules Spikes (Spikes), mopping the floor of his apartment. Both plaintiff and Spikes, who was also deposed, confirm that Spikes was mopping immediately during or just prior to the incident. Plaintiff stated that, after the incident, she notified the relevant building authorities, who promptly responded and had Spikes clean the subject area. She also attested to the fact that there was no water in the hallway earlier in the day when she went in and out of the building at various times.

Plaintiff’s excuse for failing to oppose defendants’ summary judgment motion is that defendants had not produced as a witness, the Resident Associate, Brandon Santiago (Santiago),

who had actual knowledge of when the accident site was inspected or cleaned prior to the accident. Plaintiff argues that Santiago's deposition was necessary to properly oppose defendants' summary judgment motion.

Defendants moved for summary judgment on July 18, 2019, the motion was adjourned to October 8, 2019, and the parties stipulated to depose Santiago on October 10, 2019. Defendants contend that the parties agreed that Santiago's deposition would be conducted after defendants' motion for summary judgment was submitted and heard.

In his affidavit, Jason Poore (Poore), Foxy Management LTD's building property manager, explained the general cleaning/maintenance procedures and focused on the date of the incident. Poore stated: "Barrier Free Living HDFC ("Barrier") is a Company that provides the social workers whom assist the tenants in their daily living environment. These individuals include the Residential Associates and front desk personnel. Barrier is not involved in or responsible for the cleaning and maintenance of the floors and hallways." Poore noted that Santiago's role regarding the incident was that after it occurred, plaintiff went to the front desk and advised Santiago of Spikes' conduct and that there was water on the floor coming from Spikes' apartment, whereupon, Santiago went to Spikes and requested that he clean the floor.

CPLR 5015 (a) (1) provides that the court which rendered a judgment or order may relieve a party from it based upon grounds of excusable default....To prevail on a motion to vacate, a party is required to demonstrate a reasonable excuse and a meritorious claim or defense to the action (*see Hertz Vehicles, LLC v. Mollo*, 171 AD3d 651 [1st Dept 2019]).

A meritorious claim in a premises liability case arises when a property owner breaches its duty to maintain its property in a reasonably safe condition in view of all the circumstances so as to prevent foreseeable injuries to others on the premises (*see Peralta v Henriquez*, 100 NY2d 139,

144 [2003]). To recover damages for injuries caused by an alleged breach of this duty, a plaintiff must establish that a defective condition existed and that the property owner created the condition or had actual or constructive notice of the condition (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646 [1996]; *Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302, 303 [1st Dept 2006]; *Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 24 [1st Dept 2004]; *Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). “A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Gairy v 3900 Harper Ave., LLC*, 146 AD3d 938, 939 [2nd Dept 2017]; *Mullin v 100 Church LLC*, 12 AD3d 263, 264 [1st Dept 2004]).

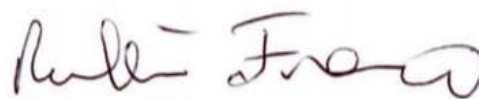
In *Porco v Marshalls Dept. Stores* (30 A.D.3d 284, 285 [1st Dept 2006]), plaintiff allegedly slipped on a clear liquid substance in the aisle of defendants' store. The Court indicated that evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell should have been provided.

Plaintiff's excuse for failing to submit opposition to the summary judgment motion is that she was unable to depose Santiago because defendants did not produce him. Even if the court were to accept this as a reasonable excuse, as noted in the October 18, 2019 Order, based on plaintiff's own testimony and that of her neighbor, who admitted that he created the condition three minutes before the accident occurred, defendants could not be found liable, regardless of Santiago's testimony (*see Rosario v Haber*, 146 AD3d 685 [1st Dept 2017]; *Nepomuceno v City of New York*, 137 AD3d 646, 647 [1st Dept 2016]; *Espinal v New York City Hous. Auth.*, 215 AD2d 281, 281-282 [1st Dept 1995]).

Accordingly, plaintiff's motion to vacate the October 18, 2019 Order is denied.

This constitutes the Decision and Order of the court.

Dated: April 10, 2020

A handwritten signature in black ink, appearing to read "Rubén Franco". The signature is written in a cursive style with a horizontal line underneath it.

Rubén Franco, J.S.C.