

Bazan v R.G. Ortiz Funeral Home Inc.

2022 NY Slip Op 30781(U)

March 9, 2022

Supreme Court, New York County

Docket Number: Index No. 159493/2016

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

SANDRA BAZAN,

Plaintiff,

- v -

R.G. ORTIZ FUNERAL HOME INC.,135-141 EAST 103RD ST. LLC,

Defendant.

-----X

R.G. ORTIZ FUNERAL HOME INC.,, 135-141 EAST 103RD ST. LLC,

Plaintiff,

-against-

JC REMODELING

Defendant.

-----X

INDEX NO. 159493/2016

MOTION DATE 02/07/2022, 02/07/2022

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

Third-Party Index No. 595514/2018

The following e-filed documents, listed by NYSCEF document number (Motion 007) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 179, 180

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 008) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 173, 174, 175, 176, 177, 178, 181, 182

were read on this motion to/for JUDGMENT - SUMMARY

BACKGROUND

Plaintiff commenced this action seeking damages for personal injury she sustained when she fell down the stairs at a funeral home owned by R.G. Ortiz Funeral Home Inc., 135-141 East 103rd St. LLC (collectively "RGO"). RGO commenced a third-party action against JC Remodeling (JC) whom they allege installed the stairs that plaintiff fell on.

PENDING MOTIONS

On December 16, 2021, JC moved for summary judgment dismissing the third-party complaint. On January 14th, 2022, RGO moved for dismissal of the complaint or alternatively for summary judgment against JC. On February 7, 2022 the motions were fully briefed and marked submitted.

The motions are consolidated herein for determination and denied for the reasons stated below.

ALLEGED FACTS

On December 6, 2015, at approximately 6 pm, plaintiff was injured when she fell down the steps as she was leaving the funeral home owned by RGO and located at 135-141 East 103rd Street, New York, New York (Subject Premises).

Plaintiff alleges that the optics of the stairs caused her to fall as they all blended into each other. Additionally, plaintiff's expert alleges that the treads on the steps were worn.

RGO had JC replace the steps, but there it is not clear from the record if this was done before or after plaintiff's fall.

DISCUSSION

Both motions are denied as there are Material Questions of Fact to be Determined at trial

It is well settled that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material issue of fact. *Black v. Kohl's Dept. Stores, Inc.*, 80 A.D.3d 958 (3rd Dept. 2011); *Benizii v. Bank of Hudson*, 50 A.D.3d 1372 (2008). Considering the drastic nature of the remedy, the party moving for summary judgment must establish *prima facie* entitlement to judgment as a matter of law. *Jacobsen v. New York City Health and Hospitals Corp.*, 22 N.Y.3d 824 (2014); *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728

(2014). “This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *Jacobsen* at 833.

The non-moving party must be accorded the benefit of every reasonable inference from the record proof. *Winne v. Town of Duanesburg*, 86 A.D.3d 779 (2011). It is not the Court’s role to determine issues of fact or credibility, but merely to determine whether such issues exist. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499 (2012); *Green v. Quincy Amusements, Inc.*, 108 A.D.3d 591 (2013); *Pearson v. Dix McBride, LLC*, 63 A.D.3d 895 (2009). If the proponent of summary judgment fails to make a *prima facie* showing of entitlement to judgment as a matter of law, then the court must deny the motion, regardless of the sufficiency of the opposition set forth by the opponent of the motion. *Voss, supra*; *Smalls v. AJI Industries, Inc.*, 10 N.Y.3d 733 (2008). The proponent of a motion for summary judgment cannot rely merely on conclusory, unsubstantiated assertions. *Longtemps v. Oliva*, 110 A.D.3d 1316 (2013). It is likewise insufficient for the proponent of summary judgment to merely point to gaps in the defendant’s proof. *DiBartolomeo v. St. Peter’s Hosp. of City of Albany*, 73 A.D.3d 1326 (2010); *Rachlin v. Michaels Arts & Crafts*, 118 A.D.3d 1391 (2014). A motion for summary judgment should not be granted if there is uncertainty as to the existence of triable issues of fact when viewing the evidence in the light most favorable to the party opposing the motion. *Flower v. Noonan*, 271 A.D.2d 825 (2000).

In this action both RGO and JC have fallen far short of meeting their burden of establishing judgment as a matter of law.

RGO alleges that plaintiff failed to identify the defect in the stairs that caused her fall. This allegation is not borne out by the facts in the motion record. Plaintiff testified more than once at her deposition that she fell because the stairs all blended into each other. Plaintiff’s

deposition testimony may have been somewhat inarticulate; however, she clearly identified the blending of the steps as the cause of her fall.

This testimony is supported by plaintiff's expert. Plaintiff's expert Paul J. Angelides, PE opines that his inspection in July 2018 found that the stair tread edges are not readily apparent or adequately delineated, thereby creating an inherently dangerous walking condition that increases the risk for a fall. He further stated that the risk for a fall is particularly high during descent because the uniform and dark colored treads blend together. As a result, the tread edge is camouflaged. Under such conditions, he opines, a descending pedestrian is susceptible to overstepping the concealed tread, thereby causing their foot to "slip" off the tread edge. The treads would have been particularly difficult to perceive at the reported 6 p.m. time of accident due to the lack of natural daylight entering the building via the adjoining front exit.

Thus, Mr. Angelides concludes that the absence of visually contrasting, adequately delineated, and readily apparent tread edges can be cited as a defect that was the proximate cause for the reported circumstances of plaintiff's accident. The hazard posed by non-contrasting and inadequately delineated tread edges is a well-known and documented issue in the industry.

However, it is not clear that Mr. Angelides' report will have any relevance at trial, as JC's principal testified that immediately after an accident the stairs were repaired and therefore the stairs examined by Mr. Angelides may not be the stairs that plaintiff tripped on.

Rikard Vuka (Vuka) the principal of JC testified that he had often done work for RGO but as of February 2020 he was no longer doing so. Vuka testified that when he did work for RGO it was based on a handshake and the transactions were generally not documented. When Vuka was shown the alleged invoice of the work on the stairs at issue Vuka definitively stated it was not his invoice and not his signature.

Vuka installed new steps at the Subject Premises and painted the railings. The job cost between two and three thousand dollars and he was paid in cash. Vuka was called by RGO to do the job immediately after a woman had fallen on the stairs. Vuka testified that the stairs had been blocked off after the accident until he came to do install the new stairs.

Vuka's testimony combined with the other admissible evidence suggest that RGO installed new stairs after plaintiff's accident.

Michael Ortiz (Ortiz) testified for plaintiff. Ortiz testified that no one else had fallen and been injured on the stairs prior to plaintiff. Ortiz at the beginning of his deposition has no specific recollection about when the new stairs were put in. His initial testimony on the issue was based on an unauthenticated "invoice" he was shown and simply read from. Later, towards the end of his deposition, he claimed to have a better recollection of the incident.

While the evidence suggests that the new stairs were installed after plaintiff's accident this is a finding of fact that can not be made on motion papers, and also involves a determination of the weight and credibility of Ortiz & Vuka.

Additionally, RGO has its own expert. Some of RGO's facts as recited in the motion and expert affidavit are incorrect. RGO repeatedly asserts that the plaintiff was injured in December 2017, when in fact the accident took place in December 2015. RGO's expert also inspected the Subject Premises and stairs, although that inspection took place in December 2020, which again may have been after JC replaced the stairs in response to the accident. RGO's expert disputes the opinion provided by plaintiff's expert regarding the cause of the fall.

In sum the questions of fact to be determined at trial include whether the stairs were defective and such defect led to plaintiff's fall, and whether JC installed the new stairs before or

after plaintiff fell. These issues preclude judgment as a matter of law on this record for either of the moving parties.

WHEREFORE it is hereby


ORDERED that the motions of R.G. ORTIZ FUNERAL HOME INC. and JC REMODELING for summary judgment are denied in their entirety; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/9/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE