

McGarrity v Brooklyn Kings Plaza LLC

2022 NY Slip Op 33672(U)

October 20, 2022

Supreme Court, Kings County

Docket Number: Index No. 519456/2018

Judge: Bernard J. Graham

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

EDWARD MCGARRITY and DEBRA MCGARRITY,

Index No.: 519456/2018

Plaintiffs,

DECISION / ORDER

-against-

BROOKLYN KINGS PLAZA LLC,

Hon. Bernard J. Graham
Supreme Court Justice

Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: dismiss plaintiff's complaint pursuant to CPLR 3212.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1-2</u>
Order to Show cause and Affidavits Annexed.....	<u> </u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u> </u>
Other.....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant Brooklyn Kings Plaza LLC ("Kings Plaza"), has moved (seq. 2), pursuant to CPLR Section 3212, for an Order, dismissing plaintiff's¹ complaint upon the grounds that (1) the plaintiff will be unable to establish that the bench which allegedly caused plaintiff to fall was dangerous and/or defective; (2) the defendant did not create or have actual or constructive notice of the alleged condition that allegedly caused the accident; (3) the condition which allegedly caused the accident was open and obvious, not inherently dangerous and was readily observable through the use of one's senses.

Counsel for the plaintiff has opposed the relief sought by the defendant upon the grounds that the defendant created the dangerous condition and had notice of the condition.

¹ The derivative claim filed on behalf of Debra McGarrity was withdrawn. The sole remaining plaintiff is Edward McGarrity.

Counsel further contends that the question as to whether a dangerous or defective condition exists is usually reserved for the jury.

Background:

The plaintiff commenced the within action by the filing of the Summons and Complaint on or about September 27, 2018. Issue was joined by the service of an answer on behalf of the defendant Kings Plaza on or about October 22, 2018.

The law office of Shulman & Hill, PLLC, substituted for the office of Louis C. Fiabane, as counsel for the plaintiff, on or about January 17, 2019.

The deposition of the plaintiff was conducted on October 29, 2019. Michael McCarthy, the operations manager for the defendant submitted to an E.B.T. on January 8, 2020 on behalf of the defendant.

Non-party Debra McGarrity, (the spouse of the plaintiff) was deposed on June 30, 2020.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about January 5, 2021.

Facts:

On June 14, 2018, the plaintiff was shopping with his wife at the Kings Plaza Mall. The plaintiff was alleged to have been walking with his wife on the second or upper floor of said Mall when his wife went to the restroom and he attempted to sit on a bench in the lobby area. This bench was described by plaintiff as being 2 ½ feet high and 4 feet long (see plaintiff's EBT p. 18-21). The plaintiff testified that when he tried to sit on the bench, it slid from under him (see plaintiff's EBT p. 22). The plaintiff further testified that he was able to get up on his own right away after the incident. When plaintiff's wife returned from the bathroom, they walked over to security to report the incident (see plaintiff EBT p. 26, 27).

The defendant contends that they regularly inspect the premises, including the area

in question. The defendant maintains that benches² are not bolted or affixed to the ground so they can be moved to enable sweeping and cleaning, as well as to accommodate public events and decorating for the holiday season (see McCarthy EBT p. 29-30, 33).

Parties' Contentions:

Here, the Court is presented with the issue as to whether Kings Plaza caused, created, or had prior actual or constructive notice of a dangerous and/or defective bench on the second floor near the restrooms in the Kings Plaza Mall.

In support of defendant's motion for summary judgment and a dismissal of this action, Kings Plaza asserts that they neither caused or created the alleged dangerous condition of the bench, nor had any actual or constructive notice of the alleged dangerous condition that plaintiff contends resulted in his fall. Kings Plaza also claims that the condition of the bench was open and obvious, not inherently dangerous, and readily observable by making reasonable use of one's sense.

In opposition, counsel for plaintiff argues that the defendant has not met its burden of proof that summary judgment and a dismissal of the action is appropriate. Plaintiff argues that defendant was aware the bench could shift and should have taken measures to prevent the bench at issue from shifting, claiming that a shifting bench is a dangerous condition. Counsel further asserts that due to the defendant's failure to secure the bench and prevent it from shifting, plaintiff fell and sustained serious physical injuries which required surgery to his lumbar spine as well as having to undergo physical therapy.

Discussion:

The moving party in a motion for summary judgment bears the initial burden of demonstrating a prima facie case of entitlement to judgment as a matter of law by submitting sufficient evidence to demonstrate the absence of any material issue of fact.

² The bench was described by Michael McCarthy (Macerich Kings Plaza Operations Manager) ("Mr. McCarthy"), as a four-legged, cushioned bench with a metal frame that is approximately 6 foot long and 2 ½ to 3 feet wide. There are several benches of this type throughout the mall (see McCarthy EBT p. 19, 35).

Drago v. King, 283 AD2d 603, 725 NYS2d 859 [2d Dept. 2001]. Here, defendant Kings Plaza has offered deposition testimony from Michael McCarthy (Macerich Kings Plaza Operations Manager) (“Mr. McCarthy”), as well as the affidavits from Kevin McGrath (Allied Universal Manager) (“Mr. McGrath”), Bruno Viana (C&W Facility Services Inc.’s Maintenance Manager) (“Mr. Viana”), and Dean Wertheim (C&W Facilities Services Inc.’s Porter) (“Mr. Wertheim”).

To establish a prima facie case against a property owner, plaintiff must be able to demonstrate that defendant either created the condition which was the cause of the accident or that it had actual or constructive notice of the condition. *See Kane v. Human Services Center, Inc.*, 186 AD2d at 540). To maintain a viable action, plaintiff must establish that defendant failed to remedy the alleged condition after it had actual or constructive notice. *See Gordon v. American Museum of Nat. Hist.*, 67 NY2d 836, 501 NYS2d 646 (1986). The movant in a motion for summary judgment must show that, as a matter of law, it lacked actual or constructive notice of the alleged defective condition. *See Ostuni v. East Rockaway Village Tavern, Inc.*, 238 AD2d 558 [2d Dept. 2007].

Actual notice may be found where the defendant created the condition or was aware of its existence prior to the accidents. *See Pianforini v. Kelties Bum Steer*, 258 AD2d 634, 635, 685 NYS2d 804 [2d Dept. 1999]. For constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the incident to permit defendant’s employees to discover and remedy it. *See Negri v. Stop & Shop*, 65 NY2d 625, 491 NYS2d 151 (1985); *Kane v. Human Services Center, Inc.*, 186 AD2d 539, 588 NYS2d 361 [2d Dept. 1992]. Proof of regular inspections and maintenance of the area in which an accident occurred is ordinarily sufficient to satisfy defendant’s burden of showing absence of notice on a motion for summary judgment. *Hagin v. Sears, Roebuck and Co.*, 61 AD3d 1264, 876 NYS2d 777 [3rd Dept. 2009]. This Court also recognizes that the mere happening of an accident does not establish liability under a negligence theory. *See Lewis v. Metropolitan Transit Auth.*, 99 A.D.2d 246, 472 N.Y.S.2d 368 (1st Dept. 1984).

The defendant, Kings Plaza, has shown through the deposition testimony of Mr.

McCarthy and the affidavits of Mr. McGrath, Mr. Viana, and Mr. Wertheim, that the bench was kept in a reasonably safe condition and that the accident was not caused by a defective condition with the bench.

The defendant claims that the deposition testimony of Mr. McCarthy sufficiently establishes that the area was regularly cleaned and maintained, and there was no notice of a dangerous condition with respect to the bench. In his deposition, Mr. McCarthy testified that he was not aware of a single incident related to the specific type of bench at issue prior to June 14, 2018, and that if there were any incidents related to these benches, they would have been recorded in an incident report. According to Mr. McCarthy, the benches were routinely moved to clean the tiled floors, and would also be moved for events and decorating during the holiday season. Mr. McCarthy also stated that it is part of his duties as an Operations Manager to inspect the mall, and during his walkthroughs he had never seen any scratch marks on the tile around the areas of the benches.

In addition, defendant Kings Plaza offers the affidavit of Mr. McGrath, the Security Manager who prepared the incident report, to support their contention that the bench was not defective. Mr. McGrath stated that he recalled plaintiff informing him that he fell on the ground when he attempted to sit on the bench at issue. When Mr. McGrath accompanied plaintiff to the area of the alleged accident, he stated that he inspected the bench at issue and observed that it was fully functioning with no defect. Mr. McGrath also stated that he checked the floor and the area surrounding the bench and did not observe any debris, water, oil, or anything that might create a hazardous condition.

Defendant also offers the affidavit of Mr. Viana, a Maintenance Manager, who stated that he is familiar with the bench at issue, and had never received any complaints or learned of any incidents concerning that specific bench or other benches of that type prior to the alleged accident.

Defendant further offers the affidavit of Mr. Wertheim, a porter who was working on June 14, 2018. Mr. Wertheim stated that part of his duties that day involved sweeping the floors of the mall, which required him to move furniture, such as the bench at issue. Mr. Wertheim stated that he moves the benches in the area where the alleged accident

occurred every morning (and has done so for the past five years), and has never had a problem with any of the benches, nor has he needed to replace any of them. Mr.

Wertheim explained that if a bench was not in proper working order when he moved it in the morning, he would have reported it or replaced it. Mr. Wertheim further stated that he has never received any complaints about the benches and has never seen one slip out from underneath anyone.

In opposition, plaintiff has failed to offer any evidence that the bench was defective or constituted a dangerous condition. Rather, plaintiff advances the speculative and conclusory argument that the bench was a dangerous condition because “the bench was caused to shift on its own.” (See NYSCEF Doc. #45, para. 30). Plaintiff also argues that the bench should have been bolted or affixed to the floor, or should have had some kind of grip or felt pads to prevent it from moving. However, plaintiff’s counsel has failed to offer an expert affirmation of a professional engineer who can opine on whether the mobility of the bench was a dangerous condition. Counsel for plaintiff does not point to any evidence that the benches are required to be bolted or affixed to the floor, and also does not offer any prior incident reports relating to injuries caused by a shifting bench. Further, there has been no evidence presented that the bench was an obvious hazard that the defendant Kings Plaza would have had a duty to warn plaintiff of.

Liability may not be imposed on a party who “merely furnished the condition or occasion for the occurrence of the event but was not one of its causes.” Ortiz v Jimtion Food Corp., 274 AD2d at 508.

As such, this Court finds that the bench at issue was not a dangerous condition, defendant Kings Plaza did not cause and create any alleged dangerous condition with respect to the bench at issue, and defendant Kings Plaza did not have any actual or constructive notice of an alleged dangerous condition with respect to the bench at issue.

Conclusion:

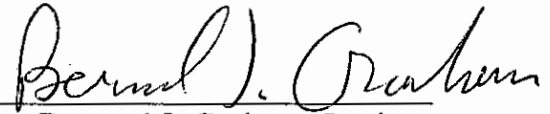
The defendants have met their burden for establishing a prima facie case for summary judgment, and the plaintiff, in opposition, has failed to meet their burden to

offer admissible evidence raising a question of fact as to whether the defendants caused or created, or had actual or constructive notice of a dangerous condition with respect to the bench that allegedly caused plaintiff to fall. Accordingly, the motion by defendant Kings Plaza for summary judgment and a dismissal of plaintiff's complaint, pursuant to CPLR §3212, is granted.

This shall constitute the decision and order of this Court.

Dated: October 20, 2022
Brooklyn, NY

ENTER


Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM