

Roth v Retail Prop. Trust

2023 NY Slip Op 32019(U)

June 16, 2023

Supreme Court, Kings County

Docket Number: Index No. 501685/20

Judge: Robin S. Garson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 75
PRESENT: Hon. Robin S. Garson, Justice

KLARA ROTH,

Plaintiff,

Index No. 501685/20

-against-

Decision & Order

Mot. Seq. 1 & 2

THE RETAIL PROPERTY TRUST, SIMON PROPERTY
GROUP, L.P., SIMON PROPERTY GROUP,
INC., and CRS FACILITY SERVICES, LLC

Defendants.

Recitation, as required by CPLR § 2219(a), of the following papers considered:

	Papers Numbered
Notice of Motion – And affidavits (Affirmations) Annexed	58-74 (Ex. A-L), 75-91 (Ex. A-N)
Answering Affidavit (Affirmation)	94-103 (Ex. 1-6), 104-112 (Ex. 1-5), 117-123 (Ex. A-E)
Reply Affidavit (Affirmation)	113, 114-116 (Ex. A)

Plaintiff Klara Roth (“Roth”) brought this action to recover damages for personal injuries against The Retail Property Trust, Simon Property Group, L.P., Simon Property Group, Inc. (collectively “The Mall”) and CRS Facility Services, LLC (“CRS”). Roth alleges that she sustained injuries when she slipped and fell at the premises owned and controlled by The Mall, due to the negligence of The Mall and CRS. The Mall and CRS each move for summary judgment pursuant to CPLR § 3212 dismissing plaintiff’s amended complaint and their respective crossclaims. CRS’ motion is granted to the extent; The Mall’s motion is denied.

Plaintiff alleges that on October 14, 2018 she slipped on ice cream as she descended the middle of a set of approximately 4 steps leading from one level of the shopping mall (commonly known as Roosevelt Field Mall or Roosevelt Field) to another. It is undisputed that the stairs had handrails on either side, but not down the middle. Plaintiff alleges that she fell down the steps when she slipped on ice cream because there was no center handrail with which she could catch herself. Plaintiff alleges that ice cream and the absence of a middle hand rail are each a proximate cause of her accident.

CRS

CRS is a janitorial services provider that contracted with Simon Property Group, L.P. for janitorial services at the premises. It is undisputed that the contract was in effect on the date of the accident.

A contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). There are, however, three exceptions where a contractor may owe a duty to third parties: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm . . . (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Id.* at 140 [internal quotation marks and citations omitted]). CRS is not required to affirmatively demonstrate that these exceptions are inapplicable in order to establish its prima facie entitlement to judgment as a matter of law (*Hagan v City of New York*, 166 AD3d 590 [2d Dept 2018]).

Nothing in the record before the Court establishes a duty owed by CRS under the first or second *Espinal* exceptions—there is no contention that CRS launched a force or instrument of harm nor that plaintiff knew of and detrimentally relied on the continued performance of CRS' contractual duties. As to the third exception, plaintiff fails to identify evidence, such as a provision or language in the contract, to raise a triable issue of fact as to whether CRS' contract was intended to entirely displace The Mall's duty to maintain a safe premises. Nor does plaintiff offer other exhibits that show that, even without a contractual provision, CRS did in fact displace The Mall's duty.

Plaintiff does not allege in her pleadings, Bill of Particulars, or by exhibits in opposition to the motion that any of the elements giving rise to the *Espinal* exceptions as to CRS are present here.

The Mall

The Mall contends that Roth merely speculates that she slipped on ice cream and that, even if plaintiff sufficiently identifies the reason she slipped, it had no actual or constructive notice of ice cream on the step, nor an obligation to install a middle handrail.

Plaintiff in her examination before trial testified that she slipped on ice cream on the second step of the subject stairs. She further testified that after she fell, she saw ice cream on the step and that there was ice cream on her pants. Plaintiff is entitled to attach reason and circumstance in determining the manner in which she fell. Plaintiff's account is not mere speculation. Accordingly, The Mall fails to establish that plaintiff merely relies on speculation to identify ice cream as the instigator of the slip (*see Palahnuk v Tiro Rest. Corp.*, 116 AD3d 748 [2d Dept 2014]).

The Mall further argues that even if plaintiff sufficiently identifies the circumstances of her accident, it had no actual or constructive notice of ice cream on the step. In a premises liability action, a defendant moving for summary judgment has the burden of demonstrating, prima facie, that it did not create the dangerous condition as alleged or have actual or constructive notice of it (*see Parietti v Wal-Mart Stores, Inc.*, 29 NY3d

1136 [2017]). To satisfy its burden, The Mall is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall (*see Campbell v New York City Transit Authority* 109 AD3d 455, 456 [2d Dept 2013]; *see also Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598 [2d Dept 2008]).

The Mall does not annex an exhibit showing a maintenance schedule or when the steps were last cleaned or inspected prior to the accident. The Mall's general manager, Christopher Brivio, testified at a deposition that he "walks the mall daily" and denies that he had "ever seen ice cream" or other debris on the steps in question prior to October 14, 2018. There is a complete absence of evidence with as to timing, location, frequency, notes or records or indicia of inspection, maintenance or routine on the date of the accident. Brivio's testimony about his daily stroll through the mall does not satisfy The Mall's requisite showing.

As for the absence of a middle handrail, plaintiff's deposition testimony is unequivocal that she slipped while walking down the middle of the steps rather than at either side. While The Mall's expert avers that a middle handrail was unnecessary, plaintiff's expert opines that a middle handrail was necessary. Each expert's opinion is premised on a different set of factual underpinnings – specifically, the dimensions and design of the stairway – and application of different regulations. The competing expert opinions are not determinative of the issue. Left unresolved, on the record before the court, is whether a middle handrail was required and whether the absence of a middle handrail was a proximate cause of plaintiff's slip and/or fall. For the reasons stated above, it is hereby:

ORDERED that CRS Facility Services, LLC's motion for summary judgment is granted to the extent that the amended complaint is dismissed as to it; further, it is

ORDERED that the portion of CRS Facility Services, LLC's motion to dismiss the crossclaims asserted against it is denied as moot; further, it is

ORDERED that The Retail Property Trust, Simon Property Group L.P., and Simon Property Group Inc.'s motion for summary judgment dismissing the amended complaint is denied; further, it is

ORDERED that the portion of The Retail Property Trust, Simon Property Group, L.P., and Simon Property Group, Inc.'s motion to dismiss the crossclaims asserted against them is denied as moot; further, it is

ORDERED that leave is granted to The Retail Property Trust, Simon Property Group, L.P., and Simon Property Group, Inc. to bring a third-party action against CRS Facility Services, LLC.

Plaintiff shall serve a copy of this Order along with notice of entry on all parties within 20 days of the date of this Order.

The above is the Decision and Order of the Court.

Dated: June 16, 2023

ENTER:



Robin S. Garson, A.J.S.C.

HON. ROBIN S. GARSON
A.J.S.C.