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| <b>Sylvester v Vinegar Hill Asset, LLC.</b>                                                                                                                                                                                    |
| 2023 NY Slip Op 32661(U)                                                                                                                                                                                                       |
| July 21, 2023                                                                                                                                                                                                                  |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: Index No. 523620/2020                                                                                                                                                                                           |
| Judge: Francois A. Rivera                                                                                                                                                                                                      |
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HONORABLE FRANCOIS A. RIVERA

AVIS SYLVESTER,

Plaintiff,

- against -

VINEGAR HILL ASSET, LLC.,

Defendants.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21<sup>st</sup> day of July 2023

## DECISION & ORDER

Index No.: 523620/2020

Oral Argument: 6/8/2023

Cal. No.: 66, Ms. No.: 9

Recitation in accordance with CPLR 2219(a) of the papers considered on the notice of motion of Vinegar Hill Asset, LLC (hereinafter the defendant or the movant) filed on March-13, 2023, under motion sequence number nine, for an order pursuant to CPLR 3212 granting summary judgment in the defendant's favor on the issue of liability and dismissing the verified complaint of Avis Sylvester. The motion is opposed.

(KCCO). On August 25, 2020, plaintiff filed a note of issue with the KCCO.

-Notice of motion

-Affirmation in support

Exhibits A-I

-Memorandum of law in support

-Statement of material facts

-Affirmation in opposition

Exhibits 1-4

-Affirmation in reply

## BACKGROUND

On November 25, 2020, plaintiff commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On April 13, 2021, the defendant interposed and filed a verified answer to the verified complaint with the KCCO. On August 25, 2020, plaintiff filed a note of issue with the KCCO.

The verified complaint and plaintiff's bill of particulars allege the following salient facts.

On July 2, 2020, at 6:45 pm, plaintiff, while at 1639 Carroll Street, Brooklyn, New York 11213,

at a premise owned and operated by the defendant, rested against a small brick divider providing foundation for a gate/fence when the defective gate/fence gave way, causing plaintiff to fall and strike her body (hereinafter the subject accident). The subject accident was caused by and due to the negligence and carelessness of the defendant in the ownership, renovation, repair, control, maintenance, management, supervision, inspection, and operation of the premise. Defendant was negligent in failing to provide a safe place of residence as required by law and in causing or creating a dangerous, defective, and unsafe condition at the premise. The plaintiff sustained permanent physical injury caused by the subject accident.

#### LAW AND APPLICATION

To establish a prima facie case of negligence in a premises liability action, a plaintiff must demonstrate the existence of a dangerous or defective condition that caused his or her injuries, and that the defendant either created or had actual notice or constructive notice of the condition (*Robert v. Mahopac Cent. Sch. Dist.*, 38 A.D.3d 514 [2nd Dept 2014]). A defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that no dangerous or defective condition existed at the time of the plaintiff's accident (*see Haxhia v. Varanelli*, 170 A.D.3d 679, 681 [2nd Dept 2019]).

The defendant contend that plaintiff cannot establish a prima facie negligence cause of action because (1) the defendant did not have a duty of care to warn or protect plaintiff of a gate that was unlocked; (2) defendant did not breach any duty of care owed regarding the unlocked gate; (3) and plaintiff's own action was the sole proximate cause of the subject accident.

There is no dispute that the defendant owns the subject premise. It admitted that fact in its answer. Facts admitted in a party's pleadings constitute formal judicial admissions and are conclusive of the facts admitted in the action in which they are made. McKinney's CPLR 3018(a)

(*DeSouza v. Khan*, 128 A.D.3d 756 [2nd Dept 2015]). Landowners generally owe a duty of care to maintain their property in a reasonably safe condition and are liable for injuries caused by a breach of this duty (*Shvyetsov v. 1900 Newkirk Ave., LLC*, 217 A.D.3d 704 [2nd Dept 2023]). The defendant owed a duty of care to the plaintiff to keep its premise reasonably safe.

In support of the motion the defendant submitted, among other, things, the deposition transcript of Chesky Engel, a member of the defendant, Manuel Marin, the super of the subject premise, and the plaintiff. The defendants, however, did not use the testimony of Chesky Engel and Manuel Marin in support of the motion.

The defendant made the following arguments. There is no duty to protect or warn against an open an obvious condition that is readily observable by those employing the reasonable use of their senses, and that is not inherently dangerous (*Sneed v. Fulton Park Four Assoc., L.P.*, 192 A.D.3d 1058, 1059 [2nd Dept 2021]). The subject gate was not dangerous, defective, or inherently dangerous. The subject accident occurred because the plaintiff leaned against an unlocked gate thinking that it was closed and fell when it unexpectedly swung open. Relying on these facts, defendant concludes that it breached no duty to the plaintiff and that plaintiff's own acts were the sole proximate cause of the subject accident.

The defendant, however, presented no evidence of the condition of the subject gate including its locking mechanism, on the date of the subject accident. By proffering no evidence of the gates condition at the time of the subject accident, the defendant failed to establish that the gate was not dangerous, defective, or inherently dangerous. The defendant also failed to establish that they lacked constructive notice of the gates defective condition. To provide constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (*Pena v.*

*Pep Boys-Manny, Moe & Jack of Delaware, Inc.*, 216 A.D.3d 809, 810 [2nd Dept 2023] citing *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff's accident occurred (*Pena v. Pep Boys-Manny, Moe & Jack of Delaware, Inc.*, 216 A.D.3d 809, 810 [2nd Dept 2023] citing *Santiago v. HMS Host Corp.*, 125 A.D.3d 838, 838 [2nd Dept 2015]). The defendant only offered the vague testimony of its super.

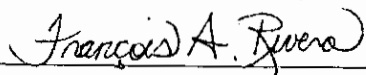
It is noted that the plaintiff submitted an affidavit of an engineer who proffered an expert opinion averring, among other things, that the subject gate and locking mechanism were defective. However, inasmuch as the defendant did not make a prima facie showing of entitlement to judgment in its favor, the motion is denied with regard to the sufficiency of plaintiff's opposition papers (*Winegrad v. New York University Medical Center* (64 N.Y.2d 851 [1985])).

## CONCLUSION

The motion of Vinegar Hill Asset, LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability and dismissing the complaint of Avis Sylvester is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

**HON. FRANCOIS A. RIVERA**  
J.S.C.