

Bailey v 94 Buena Vista, LLC

2023 NY Slip Op 34113(U)

May 1, 2023

Supreme Court, Westchester County

Docket Number: Index No. 65107/2020

Judge: Nancy Quinn Koba

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

KIM BAILEY,

Plaintiff,

against-

DECISION AND ORDER

Index No.65107/2020

Mot. Seq. No. 2

94 BUENA VISTA, LLC, OLES MANAGEMENT INC.,
MICHAEL OLES and MICHAEL OLES d/b/a
OLES MANAGEMENT,

Defendants.

-----X

QUINN KOBA, J.

By notice of motion (the "Motion"), plaintiff, Kim Bailey ("Bailey") seeks an order: (1) pursuant to CPLR 3212, for summary judgment on the issue of liability against the defendants; (2) pursuant to CPLR 3211(b), striking the affirmative defenses in the defendants' amended verified answer; and (3) for such other and further relief that is just and proper. Defendants oppose the Motion.

The following documents were considered in determining the Motion:

PAPER

NYSCEF DOC. NO.

Notice of Motion,
Affirmation in Support,
Memorandum of Law in support,
Statement of Material Facts,
Exhibits 1-15

55-73

Affirmation in opposition
Response to Plaintiff's
Statement of Material Facts,
Memorandum of Law,
Affidavit of service,
Exhibit A

74-78

Reply Affirmation

79

NYSCEF files

Based upon the foregoing, the Court makes the following determination on the Motion:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On or around November 24, 2020, Bailey commenced this action by filing a summons and verified complaint, seeking damages for personal injuries she allegedly sustained when she tripped and fell at her residence located at 94 Buena Vista Avenue, Yonkers, NY (the "Premises"). Defendant, 94 Buena Vista, LLC ("Buena Vista") owns the Premises and defendant, Oles Management, Inc., manages the Premises (NYSCEF Doc. Nos. 70 and 71). Michael Oles ("Oles") is the President of both corporate defendants (*id.*). Issue was joined on December 14, 2020 when defendant Buena Vista filed its answer with affirmative defenses.

By decision and order of this Court (Ecker, J.), dated July 5, 2022, upon Bailey's motion, the caption was amended to add Oles Management, Inc. and Michael Oles as party defendants and Bailey was given leave to serve and file an amended summons and amended complaint (NYSCEF Doc. No. 63). On or about July 7, 2022, the defendants filed an amended verified answer with seventeen affirmative defenses.

In support of the Motion, Bailey submitted, *inter alia*, the transcript from her June 21, 2021 deposition with exhibits, her affidavit, the transcript from Oles' July 12, 2021 deposition, Oles' affidavit and the expert affidavit and report of Scott M. Silberman, P.E. ("Silberman").

According to Bailey's deposition testimony and affidavit, she has resided in a second-floor apartment at the Premises since November 2019. On September 22, 2020, at approximately 9:15 p.m., Bailey, who was wearing a "house dress" and slippers with rubber soles, walked down the interior stairs of the Premises, exited through the front entrance, walked over to the exterior trash receptacles to throw away a small bag of garbage, and then started walking back toward the front entrance of the Premises to pick up her food delivery. At the time of the accident, it was dark with light coming from a streetlamp shining over the tops of the walkway's stone pavers. Bailey took the same path back toward the front entrance when her right foot got caught in the area where the asphalt driveway abuts the first stone paver of the walkway

and she "just went down" (Bailey Deposition at p. 23, lines 16-19) [NYSCEF Doc. No. 67]). Bailey regularly used this path to go to and from the garbage receptacles from the front entrance of the Premises during the daylight hours and was not aware of the condition that she alleges caused her fall (NYSCEF Doc. No. 68).

According to Bailey, the food delivery person, who was across the street with her food delivery, ran over, helped Bailey get up, handed her the bag of food, and then left. Bailey took her bag of food, walked back inside the Premises, and walked up the stairs to her apartment. The next day she called Oles to report the accident.

According to Oles' deposition testimony, Bailey called him on September 24, 2020 to report that she had an accident at the Premises on September 23, 2020. Oles then sent Emerson Ramirez ("Ramirez"), who performs various maintenance and handyman jobs at the Premises, to the Premises to speak with Bailey and to review surveillance footage from the Premises' security cameras from the night of September 23, 2020 at the time in question. Ramirez reported that he reviewed the surveillance footage which showed Bailey going to the front entrance of the Premises, getting a food delivery, and then going back upstairs without leaving the building. Oles did not have Ramirez review surveillance videos from September 22, 2020 because Bailey told him the accident happened on September 23, 2020. Oles indicated that the video footage from September 22, 2020 no longer exists because the surveillance footage only lasts for a few weeks and is then tapped over. Sometime in October 2020, Oles indicated he learned that Bailey gave him the wrong date of the accident; however, by that time, the footage from September 22, 2020, had already been taped over with footage from later date(s).

Oles further testified that, on September 24, 2020, Ramirez went to the Premises and spoke to Bailey about the accident. Ramirez reported that Bailey showed him where the accident had occurred and that he had taken photos of the body parts she claimed were injured as a result of the accident. Ramirez reported he did not observe any abrasions or bruising.

According to Oles, he did not receive any complaints about the walkway or asphalt driveway prior to September 2020. Oles stated the asphalt driveway had been repaved in 2013. Oles further testified the Building Department, Fire Department, and Housing Department inspect the property every year because the Premises is a "single resident occupancy" (SRO) property. He did not receive any violation notices from any of those municipal departments prior to September 2020.

Upon review of the materials referenced in his affidavit, including various codes, regulations, and rules, and an onsite inspection of area where the accident occurred, Silberman concluded that, in his professional opinion, there were "hazardous and defective conditions" on the Premises, that the condition existed at the time of the accident and developed over time, and that, had the area been "properly constructed and maintained" under the applicable codes, rules, and regulations, and in accordance with "good and accepted practice," the area would have provided "a safe means of travel" (NYSCEF Doc. No. 73).

In opposition, the defendants submitted, *inter alia*, the transcript from Ramirez' October 4, 2021 deposition. Ramirez performs various handyman and maintenance jobs at the rental properties owned by Oles' corporations, including the Premises. Oles had Ramirez check on Bailey because she reported having been injured in an accident. Ramirez went to the Premises and spoke to Bailey, who told him when and where the accident had occurred. Ramirez then checked surveillance cameras for the period of time from 7 p.m. to midnight on September 23, 2020. The footage showed Bailey walking down the interior stairs to pick up her food delivery and then walk back upstairs. The footage did not show Bailey leaving the building during that time period. Ramirez also viewed footage from the exterior surveillance camera from that night which did not show Bailey leaving the building or outside the building.

Upon informing Bailey that there was no footage of her having left the building on the night in question, Bailey told him that the accident could have happened two nights ago. Ramirez then viewed surveillance footage from September 22, 2020 which did not show Bailey exiting, or outside, the building. Ramirez also took photos of the body parts Bailey claimed she was injured, including her arm, knee, and shoulder. Ramirez did not notice any swelling, bruising or abrasions on those body parts. According to Ramirez, Bailey was not limping.

ANALYSIS

Summary Judgment - liability

"On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails

to establish the existence of material issues of fact which require a trial of the action. The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotations and citations omitted]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d at 505 [internal citation omitted]). "[I]n deciding a motion for summary judgment, issue-finding, rather than issue-determination, is the key to the procedure" (*id.* [internal quotation marks and citation omitted]).

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Seizeme v Levy*, 208 AD3d 809 [2d Dept] [internal quotation marks and citations omitted]).

"In the context of premises liability, a property owner is charged with the duty of maintaining his or her premises in a reasonably safe condition (citations omitted). In order for a property owner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective or dangerous condition upon the property, it must be established that the property owner affirmatively created the condition or had actual or constructive notice of its existence" (*Savitz v Lido Knitting, Inc.*, 199 AD3d 733, 734 [2d Dept 2021] [internal quotations and citations omitted]). Further, the "issue of whether a dangerous or defective condition exists depends on the facts of each case, and is generally a question of fact for the jury" *Cabanas v Qiu Yu Zou*, 2023 NY Slip Op 0p 01884 [2d Dept. April 12, 2023] [internal citations omitted]).

Here, plaintiff failed to establish prima facie entitlement to judgment as a matter of law on the issue of liability in that she did not eliminate triable issues of material fact regarding whether the accident actually occurred, the condition constituted an actionable defect, whether the defendants had actual or constructive knowledge of the allegedly defective condition, and whether the condition was inherently dangerous. None of these issues is resolved as a matter of law by the affidavit and report of Silberman, Bailey's expert plaintiff's expert.

An expert's affidavit submitted in support of summary judgment "must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor" (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008][internal quotation marks and citations omitted]). Silberman's opinion did not establish, inter alia, that the accident had actually occurred, that defendants had actual or constructive notice of a dangerous condition, or that defendants were negligent as matter of law. Silberman's opinion was conclusory and speculative in nature in relation to the contested facts presented in the depositions of Bailey, Oles, and Ramirez. Thus, Silberman's opinion did not demonstrate the absence of any material issues of fact (see *Arredondo v Valente*, 94 AD3d 920, 922 [2d Dept 2012] [internal citations omitted]). Based on the foregoing, this Court need not address the sufficiency of the defendants' opposition submissions.

Summary Judgment on Affirmative Defenses

"A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211[b]).

Bailey seeks to strike all seventeen of the defendants' affirmative defenses, which are as follows: first affirmative defense (culpable conduct); second affirmative defense (failure to state a cause of action); third affirmative defense (collateral source hearing pursuant to CPLR 4545[c]); fourth affirmative defense (no actual or constructive notice of alleged dangerous condition on the Premises); fifth affirmative defense (failure to mitigate damages); sixth affirmative defense (duplicative of second cause of action); seventh affirmative defense (open and obvious condition); eighth affirmative defense (breach of contract, want of care of Bailey and/or third parties over whom defendants have no control over); ninth affirmative defense (no unity of interest between corporate defendants and Oles); tenth affirmative defense (Oles did not exert influence over corporate defendants); eleventh affirmative defense (corporate defendants are not mere instrumentalities of Oles); twelfth affirmative defense (no causal relationship between Bailey's injuries and Oles' relationship with corporate defendants); thirteenth affirmative defense (no basis to pierce the corporate veil); fourteenth affirmative defense (assumption of risk); fifteenth affirmative defense (no acts/omissions that would create liability or duty by Oles); sixteenth affirmative defense (Bailey's negligence caused her injuries); and seventeenth affirmative

defense (reservation of right to amend answer to allege additional affirmative defenses).

Defendants' second and sixth affirmative defenses (failure to state a cause of action) are stricken, as failure to state a cause of action is not an affirmative defense.

A plaintiff moving for summary judgment on the issue of liability is not required to establish the "absence of his or her own comparative fault." "However, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging . . . culpable conduct on the part of the plaintiff" (*Seizeme v Levy*, 208 AD3d 809 [2d Dept 2022] [internal citations omitted]).

CPLR 1411 provides, in relevant part, that "[i]n any action to recover damages for personal injury . . . the culpable conduct attributable to the claimant . . . including contributory negligence or assumption of risk . . . shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant . . . bears to the culpable conduct which caused the damages." Further, the "failure to appreciate a known danger could constitute an implied assumption of risk" (*Shire v Mazzilli*, 203 AD2 275 [2d Dept 1994]).

Proof that a dangerous condition is open and obvious does not preclude a finding of liability, but instead speaks to the issue of the plaintiff's comparative negligence" (*Everett v CMI Services Corp.*, 206 AD3d 620, 621-622 [2d Dept 2022][internal quotations marks and citations omitted]).

Here, the doctrine of implied assumption of risk is applicable in negligence actions such as the instant action. There are triable issues of fact as to liability, including whether the condition was dangerous or trivial, and as to whether either party was negligent. Thus, Bailey did not establish entitlement to judgment as a matter of law to warrant the striking of the defendants' first affirmative defense (culpable conduct), seventh affirmative defense (open and obvious conditions), fourteenth affirmative defense (assumption of risk), or sixteenth affirmative defense (Bailey's negligence).

"A party seeking to avail itself of the affirmative defense of failure to mitigate damages must establish that the injured party failed to make diligent efforts to mitigate its damages, and

the extent to which such efforts would have diminished those damages" (*Rivera v Kolsky*, 164 AD3d 626 [2d Dept 2018] [internal quotations and citation omitted]). Here, Bailey claims she sought medical attention from her treating medical facility the day after the accident (NYSCEF Doc. No. 67). Bailey further stated that she went to the emergency room of St. Joseph's Hospital on October 3, 2023. Thus, the unrefuted evidence proffered by Bailey established she sought prompt medical treatment for her injuries after the accident. As such, Bailey established entitlement to judgment as a matter of law to strike the defendants' fifth affirmative defense (failure to mitigate damages). The opposition papers failed to raise a triable issue of fact to preclude the grant of summary judgment striking this affirmative defense.

As to defendants' fourth affirmative defense (lack of actual or constructive knowledge), Bailey failed to establish entitlement to judgment as a matter of law to warrant striking this affirmative defense. There is a triable issue of fact as to whether the defendants had actual or constructive knowledge of the allegedly defective condition.

CPLR 4545(a) provides, in relevant part, that "[a]ny collateral source deduction . . . shall be made by the trial court after the rendering of the jury's verdict." In their third affirmative defense, the defendants seek a collateral sources hearing under CPLR 4545(a). Bailey did not meet her burden establishing prima facie entitlement to judgment as a matter of law striking defendants' third affirmative defense. Further, this Court cannot conclude that this defense is without merit.

Bailey also did not meet her burden establishing prima facie entitlement to judgment as a matter of law striking Defendants' eighth, ninth, tenth, eleventh, twelfth, thirteenth, or fifteenth affirmative defenses. Defendants stated defenses and the defenses have merit.

Defendant's request to remove party defendants

In their opposition papers, the defendants request removal of Oles Management, Inc. and Oles as party defendants. Opposition papers are not the appropriate vehicle in which to seek such relief.

All other arguments raised on the Motion and evidence submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that the branch of plaintiff, Kim Bailey's motion for summary judgment, pursuant to CPLR 3212, on the issue of liability is denied; and it is further

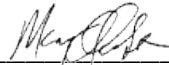
ORDERED that the branch of the Motion seeking summary judgment striking the defendants' affirmative defenses is granted to the extent that the defendants' Second, Fifth, and Sixth affirmative defenses are stricken and this branch of the Motion is otherwise denied; and it is further

ORDERED that the parties shall appear in **Courtroom 1602 for an in-person Settlement Conference on June 8, 2023 at 9:30 a.m.**

The foregoing shall constitute the Decision and Order of the Court in this matter.

DATED: White Plains, New York
May 1, 2023

E N T E R:



HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF