

Pena v Rhodes 2 L.L.C.

2024 NY Slip Op 30305(U)

January 23, 2024

Supreme Court, New York County

Docket Number: Index No. 155145/2019

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SHLOMO S. HAGLER PART 17

Justice

-----X

INDEX NO. 155145/2019

EUDELIA PENA,

MOTION DATE 08/06/2021

Plaintiff,

MOTION SEQ. NO. 005

- v -

RHODES 2 L.L.C., OXFORD 2 DELI GROCERY INC.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendant Rhodes 2 L.L.C. (“Rhodes”) moves for summary judgment dismissing plaintiff Eudelia Pena’s complaint and all cross-claims asserted against it. Defendant Oxford 2 Deli Grocery Inc. (“Oxford Deli”) cross-moves for summary judgment dismissing the complaint and all cross-claims asserted against it.

BACKGROUND FACTS

On November 12, 2018, plaintiff alleges that she fell while walking on a ramp leading from Oxford Deli, located at 2024 2nd Avenue, New York, New York (“2024”). Defendant Rhodes is the owner of the building located at 2024 and defendant Oxford Deli is the street level tenant (the “Premises”).

Deposition of Plaintiff

Plaintiff testified at her deposition that the accident occurred when she was leaving the store [Oxford Deli] (NYSCEF Doc. No. 115 [Plaintiff’s Deposition] at 11). Plaintiff stated that

she went outside with her daughter, who walked ahead of her (*id.* at 11-12). Plaintiff testified as follows:

Q. Okay, and when you came out of the door, did you step right onto the sidewalk?

A. I would call it like a ramp.

Q. And before you stepped onto that ramp, did you look at it?

A. I just went out walking. I didn't notice anything about the ramp. I was just leaving the store and as I was walking, I don't remember how or what happened, but all of a sudden found myself on the floor after taking one or two steps (*id.* at 13-14).

Q. Did you see the ramp at all when you came out of the store?

A. I don't know. I just stepped out there and I don't know what I felt or what happened, but I fell. It might have been like imbalance (*id.* at 14-15).

Q. At some point, did you get off the ground?

A. Yes, after I fell I felt embarrassed because I fell, so I got up real quick.

Q. Did anybody help you get up?

A. No just myself. I got up real quick.

Q. When you got up, did you take a look back at that ramp where you had fallen?

A. Yes.

Q. What did you see when you looked at the ramp?

A. So I just got up and I saw that that ramp was very smooth and so I just got up and left.

Q. Before you left, did you tell anybody in the store about your accident?

A. No (*id.* at 20-21).

*Deposition of Nikolaos Mastrominas ("Mastrominas")*¹

Mastrominas and his wife are the owners of Rhodes.² Rhodes purchased the subject building in the name of Rhodes 2, L.L.C. in April of 2013 (NYSCEF Doc. No. 155 [Mastrominas Deposition] at 12-13). Mastrominas testified that when Rhodes purchased the building in 2013, Oxford Deli was already a tenant and there was a ramp located on the sidewalk in front of the store (*id.* at 19, 40, 63).³ Mastrominas testified that when he is in New York, he goes to the location of the subject Premises to "look after my buildings" (*id.* at 24). Mastrominas testified "I usually don't go into stores. I just go outside to see my buildings and if there is a

¹ Nikolaos is spelled "Nicholas" in the deposition transcript.

² Mastrominas lives in Greece.

³ Mastrominas owns four properties between 104th and 105th Streets in Manhattan (*id.* 12, 16). After Mastrominas purchased these properties, he hired contractors to perform renovations (*id.* 15-16).

problem I'm there with the super and the managing agent to discuss it" (*id.*). Mastrominas testified he believes that Oxford Deli fixed the ramp over the past two to three years, but never asked him for permission to do so (*id.* 41-43). Mastrominas stated Oxford Deli added some cement "to make it smooth" (*id.* 41-42). However, Mastrominas never actually observed the deli doing such work (*id.* 40-42). At the time of the accident, Peter Stavrinis was the managing agent of the Premises (*id.* 19-20). A super goes to the buildings owned by Rhodes every day and "takes care of the cleaning and the garbage and everything else (*id.* 25-27).

Deposition of Ahmed Jobah (owner of Oxford Deli) ("Jobah")

Jobah testified that several years ago, Jobah decided to make the ramp in front of the store "bigger" and lower in height in order to make it more accessible for the handicapped (NYSCEF Doc. No. 117 [Jobah Deposition] at 13-14, 22).⁴ Jobah testified that he did not tell the landlord (Rhodes) about the plan to reconstruct the ramp. Jobah identified Peter Stavrinis, Rhodes' managing agent, and claimed not to have told him of the plan (*id.* at 14). Jobah also testified that after "Nicholas" [Mastrominas] bought the subject building, Nicholas visited the building and often used the ramp, he failed to say anything to Jobah about the ramp (*id.* at 16). Jobah testified that he hired a guy (unidentified), who "sells flowers on the corner" to make the ramp bigger (*id.* at 16). Jobah did not notify the City of New York, Department of Buildings or any other governmental agency before hiring the individual to make the changes to the ramp, and that, to date, the ramp has not been subject to inspection by any City agency (*id.* at 17-18).

Deposition of Natasha Pena

Non-party Natasha Pena ("Natasha") is plaintiff's daughter who was with plaintiff at the time of the accident. Natasha testified at her deposition that she walked out of the door of the deli

⁴ Although Jobah testified that he hired said individual to make the ramp "bigger" (*id.* at 13-14), Jobah also testified that the ramp was made "lower" not "wider" (*id.* at 22).

first and was followed by plaintiff.⁵ Natasha testified that she opened the deli door on the left side and proceeded to walk from the top left-hand side of the ramp toward the right side of the ramp (NYSCEF Doc. No. 131 [Natasha's Deposition] at 40-41). When Natasha saw her mother holding the subject door before Natasha turned around to walk down the ramp, plaintiff was holding the door and was proceeding on a similar path as Natasha (*id.* at 42). Natasha stated that after she was off the ramp and onto the sidewalk, she heard a sound from her mother and turned around "right away because [she] thought something bad had happened to her [plaintiff]" (*id.* at 24). When Natasha turned around, she saw plaintiff in the process of falling (*id.* at 25).

Natasha testified that plaintiff's right foot was on the edge of the ramp on the bottom right-hand portion (*id.* at 25-26, 43). Natasha stated that plaintiff fell from the ramp onto the sidewalk and that plaintiff told her (Natasha) that plaintiff "tripped on the crack in the ramp" (*id.* at 30-31, 34).

Affidavit of Natasha Pena

In an affidavit, sworn to on January 13, 2021 (NYSCEF Doc. No. 78), Natasha attests that on the day of the accident, "[a]s we were leaving the deli located at 301 East 104th Street in Manhattan, I walked out of the deli first with my mom following me. As soon as I stepped onto the sidewalk, I heard my mother yell and I turned around. At that time, I saw my mom falling to the sidewalk with one of her feet still on the ramp which was right next to the deli door."⁶

Summary Judgment

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320,

⁵ Natasha testified that she had no problem walking on the ramp while entering the deli (NYSCEF Doc. No. 131 [Natasha's Deposition] at 14-15).

⁶ Natasha's averment in her affidavit that at the time plaintiff fell, one of plaintiff's feet was on the ramp "right next to the deli door" is contrary to her deposition testimony that plaintiff's foot was near the bottom of the ramp.

324 [1986]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

DISCUSSION

It is well settled that “[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff’s injury” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Actual notice of a dangerous condition exists where the defendant created the condition or was aware of it before the accident (*Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 [1st Dept 2011]).

“Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises” (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005], citing *Balsam v Delma Eng’g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv denied, lv dismissed* 73 NY2d 783 [1988]). Thus, a landowner has a duty to maintain its property in a “reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks and citation omitted]). An owner has a non-delegable duty to provide “reasonably safe means of ingress and egress, and can be held vicariously liable for any negligence by [*sic*] third-party defendant that caused the

entrance to become unsafe” (*LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286, 287 [1st Dept 2008]).

“[T]he issue of whether a dangerous or defective condition exists which is sufficiently hazardous to create liability is generally a question of fact, to be resolved by a jury, on the facts particular to the case” (*Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]).

Motion by Rhodes for Summary Judgment (Seq. No. 005)

In support of its motion for summary judgment, Rhodes submits a recent survey of the premises, an affidavit from a licensed surveyor Saeid Jalilvand, sworn to on August 6, 2021 (“Jalilvand”) and the deed to the premises (NYSCEF Doc. No. 118). Jalilvand attests that the subject ramp is located outside the property line of the premises. Rhodes concludes that it has no ownership interest in the ramp.

Rhodes argues that (1) plaintiff did not know how she fell, and in fact testified that after she fell, she observed the ramp to have a smooth surface; (2) plaintiff has failed to produce any evidence that a crack in the ramp, as identified by Natasha, was a proximate cause of plaintiff’s accident; (3) Jobah admitted that prior to the accident, he hired an individual to rebuild the ramp to make it lower, thereby creating the condition of the ramp as it existed at the time of the accident; (4) NYC Administrative Code § 7-210 [“Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition”] refers to the negligent failure to “install, construct, repave, repair or replace defective sidewalk flags”, and the definition of sidewalk flags in NYC Rules and Regulations, Title 34. Department of Transportation Chapter 2: Highway Rules, Section 2-09, does not refer to ramps. Consequently, section 7-210 does not apply to the maintenance of ramps by owners, such as, Rhodes; and (5) Rhodes did not create or control the ramp or derive a “special use” from the ramp.

Oxford Deli submits partial opposition to Rhodes' motion. Oxford Deli does not oppose that part of Rhodes' motion seeking to dismiss plaintiff's claims for failure to establish a prima facie case of liability. However, Oxford Deli argues that Rhodes has a contractual duty under the governing lease, as owner, to address structural areas which have the potential to create unsafe conditions for pedestrians. Oxford Deli claims that pursuant to the lease, Rhodes is required to maintain and repair the exterior and interior spaces on the premises, which area would include the ramp. According to Oxford Deli, the ramp is a necessary appurtenance to the store in that it serves to accommodate handicapped customers. Oxford Deli also maintains that Mastrominas of Rhodes testified that he regularly visited the store and was aware of the condition of the ramp.

In opposition, plaintiff argues that the ramp is equivalent to a sidewalk, the ramp had been in existence for years with the knowledge of Rhodes, and the deposition testimony of plaintiff and Natasha is sufficient to create an issue of fact. Moreover, plaintiff submits an affidavit of Joel Schachter ("Schachter"), a professional engineer, sworn to on January 14, 2021 (NYSCEF Doc. No. 142) who visited the subject site on October 17, 2020 (almost two years after the subject accident) and opined that the design and construction of the ramp was faulty, the ramp violated various building codes, the incline or slope of the ramp was "too steep" and the ramp had no railings and a jagged and concrete surface.

Section 7-210 of the New York City Administrative Code provides that "[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition" (New York City Administrative Code § 7-210[a]). Section 7-210 further establishes liability "for any ... personal injury ... proximately caused by the failure of such owner to

maintain such sidewalk in a reasonably safe condition” (New York City Administrative Code § 7-210[b]).

It is well settled that “[a]lthough a landowner is responsible for maintaining abutting sidewalks (*see* Administrative Code of City of NY § 7-210), it is not responsible for maintaining pedestrian ramps unless it created the defect or the ramp was constructed for its special use” (*Harvey v Henry 85 LLC*, 176 AD3d 443, 444 [1st Dept 2019] citing *Gary v 101 Owners Corp.*, 89 AD3d 627, 627 [1st Dept 2011]).

Here, given that Mastrominas of Rhodes testified that he regularly visits “his” buildings to observe the outside to see if there any problems, and the super goes to the Premises every day, there is an issue of fact as to whether Rhodes, as owner of the Premises, derived a special benefit from use of the ramp. The ramp constituted the entryway to the store owned by Rhodes and leased by Rhodes’ tenant, and a representative of Rhodes was present on the site every day. “The duty to maintain the area of special use runs with the land and is not dependent upon a finding that defendants actually installed the sidewalk or repaired it” (*Karr v City of New York*, 161 AD2d 449, 450 [1st Dept 1990]; *cf Thomas v Triangle Realty Co.*, 255 AD2d 153 [1st Dept 1998]).

Cross-Motion by Oxford Deli for Summary Judgment (Seq. No. 005)

In support of its cross-motion for summary judgment dismissing the complaint, Oxford Deli argues that plaintiff’s testimony as to causation is speculative and contradictory. Oxford Deli contends that plaintiff does not remember how she fell and fails to identify what caused her to fall. Oxford Deli also argues that Natasha’s testimony and contradictory affidavit as to the exact location on the ramp where plaintiff fell, renders her testimony speculative.⁷

⁷ As stated on the record, any inconsistencies in Natasha’s deposition and affidavit are “fodder” for cross-examination at trial (NYSCEF Doc. No. 160 [Tr oral argument] at 20).

Here, it is uncontroverted that Oxford Deli created the condition or at the very least had actual knowledge of the condition of the ramp. Jobah of Oxford Deli testified that several years ago, he decided to make the ramp in front of the store “bigger” and lower it in order to make it more accessible for the handicapped (NYSCEF Doc. No. 117 [Jobah Deposition] at 13-14, 22). As such, defendant Oxford Deli failed to establish *prima facie* its entitlement to judgment as a matter of law based on evidence in the record that Oxford Deli may have created the condition that caused plaintiff to fall. Oxford Deli’s burden “was not met by identifying perceived gaps in plaintiff’s evidence” (*Maria v Concourse Estate, LLC*, 200 AD3d 578, 579 [1st Dept 2021]). “Defendant’s failure to make its *prima facie* showing requires denial of its motion, regardless of the sufficiency of plaintiff’s opposition” (*id.*; see *Sager v Waldo Gardens, Inc.*, 166 AD3d 408 [1st Dept 2018]). In any event, plaintiff was not “required to identify at the time of the accident exactly where she fell and the precise condition that caused her to fall” (*Tomaino v 209 E. 84th St. Corp.*, 72 AD3d 460, 461 [1st Dept 2010]).

On the basis of the foregoing, it is

ORDERED that defendant Rhodes 2 L.L.C.’s motion for summary judgment is denied; and it is further

ORDERED that defendant Oxford 2 Deli Grocery Inc.’s motion for summary judgment is denied.

January 23, 2024

 DATE SHLOMO S. HAGLER, 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