

Bolek-Gawin v White Plains Kensington, LLC
2024 NY Slip Op 34943(U)
December 31, 2024
Supreme Court, Bronx County
Docket Number: Index No. 24005/2020E
Judge: Elizabeth A. Taylor
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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

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MALGORZATA BOLEK-GAWIN,

Plaintiff,

Index No. 24005/2020E
Hon. Elizabeth A. Taylor,
Justice Supreme Court

WHITE PLAINS KENSINGTON, LLC and WHITE
PLAINS KENSINGTON BORROWERS, LLC,

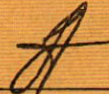
Defendants.
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The following papers numbered ___ to ___ were read on this motion (NYSCEF Seq. No. 2)

Sequence No. 2	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	27-42
Opposition, Answering Affidavit and Exhibits, Memorandum of Law	44-52
Reply Affidavit	

Upon the foregoing papers, the above motion is decided in accordance with the annexed decision and order.

Dated: DEC 31 2024

Hon. 
Elizabeth A. Taylor, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

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MALGORZATA BOLEK-GAWIN,

Plaintiff,

DECISION and ORDER
Index No. 24005/2020E

WHITE PLAINS KENSINGTON, LLC and WHITE
PLAINS KENSINGTON BORROWERS, LLC,

Defendants.

-----X

Elizabeth A. Taylor, J.

In Motion Sequence No. 2, defendants move for summary judgment pursuant to CPLR 3212 dismissing the complaint.

FACTS

Plaintiff alleges that on July 27, 2018, at approximately 11:25 a.m., she was injured by a patio umbrella that took flight due to a gust of wind at the Kensington Senior Living Facility, an assisted living facility located at 100 Maple Avenue in White Plains, New York, which owned and operated by defendants. Plaintiff was working as a care aide for a client who resided at the defendants' premises. She and her client were seated on an outdoor terrace at the corner of Maple Avenue and Longview Avenue. A patio umbrella was secured inside the table.

Plaintiff testified that whenever the weather was "nice ... and sunny the umbrellas were always open. And when it was raining, they were always taken inside and closed." On the day of the accident, the umbrella was in the open position. She described the occurrence as follows:

"Josie and I arrived on the terrace around 11:15. She was very tired, and she fell asleep. I started reading a book. At a certain time, I heard a sound as if a key was turning the type of sound that you hear when you turn a key. I raised my eyes and at that moment I saw how the umbrella is lifting up perfectly upwards. Then it leans in my direction and falls in my direction. At that moment, I pushed myself away from the table and I leaned backwards to

protect myself from getting hit. However, I was hit on the right side of my head and from that moment until the moment I came to I don't remember anything."

She stated that the umbrella lifted upwards so that the pole dislodged completely from the center of the table.

With respect to the weather conditions at the time of the accident, plaintiff testified that the weather was pleasant, with only an occasional gust of wind:

Q. Was it a sunny day?

A. Yes, the weather was very nice and sunny. It was occasional a blast of wind. It was very pleasant out.

Q. Can you approximate for me these accessional blasts of wind? How often they occurred?

A. No.

Q. With respect to these blasts of wind that you described did any of those blasts of wind cause the umbrella to be lifted from the ground?

A. That's possible.

Q. I appreciate that, but do you have a specific recollection of that occurring?

A. I wasn't paying attention.

Celina Watson, defendants' Executive Director, testified that she was present on the day of the accident, and it was a "regular sunny day." She further testified that the umbrellas are maintained on the patios during the season, and are not removed, although they might be opened or closed. Azael Olvera, a former Kensington employee, testified that he was formerly employed as a porter by the defendants, confirmed that the umbrellas would remain in place in Spring and Summer, but that they might be removed on very windy days.

Defendants' expert meteorologist Thomas M. Else submitted an expert report and supporting documentation to establish the weather conditions on the day leading to the accident. His report indicates as follows:

“Under a clear pre-dawn sky, the temperature leveled off in the upper 60s. Winds were calm. Sunrise occurred around 5:46 AM.

“For the remainder of the morning and into the mid-day hours, the weather was mostly sunny and warm. The temperature climbed into the mid-80s. Winds became south-southeast at 5 -- 11 mph. There was no rain.

“Around the time of the alleged incident, 11:25 AM --Noon, it was mostly sunny and 84 - - 85 degrees. Winds were south-southeast around 11 mph, and the visibility was unrestricted. The National Weather Service did not have any watches, warnings, advisories, and/or special weather statements in effect.”

ARGUMENT

Defendant argues that the defendants in the instant case did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises. Further, based on the meteorological evidence, the defendants had no actual or constructive notice of any wind advisories that would have informed them of any extraordinary wind conditions, and therefore should not be held liable for any consequences thereof.

Plaintiff argues that the defendants have not established that they did not create or have notice of the unsafe installation of the umbrella when they caused it to be setup and placed on the outdoor patio high above Maple Avenue. The defendants have not established that they did not have the care and custody of their patio umbrella as upon their outdoor terrace of their senior living facility. Plaintiff maintains that the defendants' experts' affidavit is insufficient as defendants' weather expert was not aware of, and did not have expertise as to, the manner in which the umbrella was secured to the table and secured against the wind. Plaintiff contends that umbrellas are regularly displaced by the wind, and that the defendants failed to establish that they took reasonable precautions to secure the umbrellas.

DISCUSSION

Summary judgment is appropriate where there are no material issues of fact. (*Sillman v. Twentieth Century-Fox Film Corporation*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498 [1957]). Ultimately, summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. “An unfounded reluctance to employ this remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims properly adjudicated.” (*Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 [1974]).

Where the moving party has established entitlement to summary judgment, the opposing parties must either demonstrate the existence of an existing material issue of fact requiring a trial or tender an acceptable excuse for failing to do so. (*Zuckerman v. New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 [1980]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 [1985].) Moreover, the adversaries’ evidence must be submitted in evidentiary form. (*Id.* See also *Rubinfield v. City of New York*, 263 A.D.2d 448, 692 N.Y.S.2d 706 [2d Dep’t 1999] [holding that it is a function of the court and not the jury to determine whether a prima facie case of causation has been established]).

A landowner has a duty to maintain its premises 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.” (*Peralta v. Henriquez*, 100 N.Y.2d 139, 144 [2003], quoting *Basso v. Miller*, 40 N.Y.2d 233, 241 [1976].) It is clear, the, that the landowner’s duty does not extend to freak occurrences or unexpected and unanticipated events.

The defendants have established a prima facie case. While the defendants had a duty to

maintain the umbrellas in a safe manner, under ordinary conditions the umbrellas were secured by placing them within the tables, with bases underneath. There is no showing that the umbrellas would need to be further secured under ordinary weather conditions. The weather conditions on the day of the accident were mild, as even plaintiff conceded. Although she claimed there were gusts of wind, these gusts did not exceed 11 mph according to meteorological reports. Accordingly, the defendants made a prima facie showing that they had no duty to take any further precautions to remove or otherwise further secure the umbrella, in view of the prevailing weather conditions.

Plaintiff has failed to rebut the defendants' prima facie case. There is no showing that the umbrellas regularly became dislodged from the tables and their bases. There is no showing that wind gusts occurred which would have placed the defendants on notice that further precautions needed to be taken.

Plaintiff argues that the umbrella was located on a patio a story or two above street level, and thus subject to high gusts of wind. However, there is no showing that this was the case. Plaintiff cites *Conlon v. Becksmad Assocs.* (5 A.D.3d 286, 774 N.Y.S.2d 501 [1st Dept. 2004]), in arguing that an umbrella at an elevated location must be secured in a special manner. However, that case is readily distinguishable, as the record in that matter disclosed that the umbrella was installed on a balcony by defendant, and defendant was aware that the balcony, by reason of its elevation and proximity to the East River, was subject to high winds, raising triable issues as to whether defendant's failure to bolt the umbrella to the balcony constituted actionable negligence. Her, as noted, there is no evidence, let alone any concession, that the patio was subject to high wind. There is no testimony to that effect. Moreover, the testimony on the day in question was that the wind was mild.

Plaintiff has accordingly failed to establish a prima facie case. The occurrence of a freak

or unexpected event does not establish negligence as notice is lacking.

Based upon the foregoing, it is hereby

ORDERED that the defendants' motion for summary judgment is granted, and the Clerk is directed to enter judgment in favor of the defendants dismissing the complaint, and it is

ORDERED that the defendants are directed to serve a copy of this Order with Notice of Entry on the plaintiff.

Dated: DEC 31 2024

ENTER:



Hon. Elizabeth A. Taylor, J.S.C.