

Martinez v Waldo Gardens, Inc.

2024 NY Slip Op 34951(U)

June 3, 2024

Supreme Court, Bronx County

Docket Number: Index No. 21201/2020E

Judge: Paul L. Alpert

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

Jose Martinez

Index No. 21201/2020E

-against-

Hon. Paul L. Alpert

Waldo Gardens, Inc. and Metro Management Dev Inc.

Justice Supreme Court

The following papers numbered 1 to were read on this motion (Seq. No. 3) for noticed on

Table with 2 columns: Document type (Notice of Motion, Answering Affidavit, Replying Affidavit) and status (No(s)).

The defendants motion is decided in accordance with the annexed decision and order of the court.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 6/3/24

Hon. [Signature]
HON. PAUL ALPERT 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 SCHEDULE APPEARANCE
FIDUCIARY APPOINTMENT REFEREE APPOINTMENT



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

-----X
Jose Martinez,

Index No.: 21201/2020E

Plaintiff,

-against-

DECISION/ORDER

Waldo Gardens, Inc. and Metro Management Dev Inc.,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of the motion as indicated below:

Papers	Numbered
Notice of Motion and Affirmation in Support & Exhibits.....	1
Affirmation in Support & Exhibits.....	2
Memorandum of Law in Support.....	3
Affirmation in Opposition.....	4
Affirmation in Reply.....	5

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff, Jose Martinez, commenced this action for personal injuries following an accident that occurred on June 13, 2019, while Mr. Martinez was descending lobby stairs within the defendants building located at 3800 Waldo Avenue, Bronx, New York and subsequently fell. The defendants, Waldo Gardens, Inc. and Metro Management Dev Inc., move for summary judgment pursuant to CPLR § 3212 to dismiss the plaintiff’s complaint. The plaintiff opposes the motion.

Mr. Martinez has resided at 3800 Waldo Avenue, Apartment 17A, Bronx, New York, since 2016 (Defendants Motion, Exhibit D, page 15, line 17- page 16 line 5). Mr. Martinez’s accident occurred within the lobby of the building (page 78 lines 3-13). Mr. Martinez does not recall the time he left his apartment on June 13, 2019 (page 85 lines 17-20). At the time of the accident, Mr. Martinez was leaving the apartment building to buy pizza (page 87 lines 16- 24). There are three stairs that make up the staircase in the lobby (page 97 lines 20-24). Mr. Martinez

testified that he slipped going down the stairs (page 99 lines 17-23). Mr. Martinez noticed liquid on the third step of the staircase when he was already on the floor (page 101 line 9- 18). Mr. Martinez claims that the liquid on the step was dirty (page 102 lines 10-15). Mr. Martinez was holding onto the handrail on his right-hand side as he was descending the stairs (page 111 lines 2-9). Security from the building, Mr. Myles, helped the plaintiff after his fall (page 116 lines 14-20).

A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320). Once the proponent of a motion for summary judgment meets this burden it is incumbent upon the party opposing the motion to submit proof in admissible form that an issue of fact exists which necessitates a trial (*Zuckerman v. City of New York*, 49 NY2d 557). The courts function on a motion for summary judgment is issue finding and not issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395). Summary judgment is a drastic remedy that deprives the litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (see *Assaf v. Ropog Cab Corp.*, 153 AD2d 520). Summary judgment will only be granted if there are no material, triable issues of fact (see *Sillman supra*). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition (*Winegrad v. New York Univ. Med Center*, 64 NY2d 851).

A defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor

had actual or constructive notice of its existence (*Smith v. Costco Wholesale Corp.*, 50 AD3d 499). Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Id.*).

The defendants argue that the plaintiff's complaint should be dismissed because the surveillance footage of Mr. Martinez's accident demonstrates that he fell because he missed a step, not because there was any liquid on the step causing him to slip and fall. "Where the videographer is not called as a witness, the video can still be authenticated with testimony that the video 'truly and accurately represents what was before the camera'" (*Torres v. Hickman*, 162 AD3d 821, 823, quoting, *People v. Byrnes*, 33NY2d 343, 349). Mr. Martinez recognized the surveillance footage of the accident and testified that it is a fair and accurate description of the accident from June 13, 2019 (Defendants motion, Exhibit E, page 13 lines 15-24). Here, the defendants established that the surveillance footage was properly authenticated through the testimony of the plaintiff. The plaintiff does not dispute the authenticity of the surveillance footage in opposition.

The video footage of the accident shows the plaintiff walking and holding a bag with the shopping cart in his left hand. Mr. Martinez is also seen looking at his phone in his right hand. Mr. Martinez can be seen putting his phone in his pocket before approaches the stairs (00:00:13). He begins to descend the steps and looks down as he takes the first step and then proceeds to look up in front of him (00:00:22). He takes his first step with his right foot and his entire foot is placed on the step. The next step he takes also has his entire left foot on the step (00:00:23). When he approaches the final step on the staircase, his foot misses the step (00:00:24).

The defendants maintain that the plaintiff's negligence was the sole proximate cause of his fall. It is clear from the surveillance footage that the depiction of the accident is contradictory to the testimony from Mr. Martinez. While Mr. Martinez maintains that his entire foot was on the third step before he allegedly slipped, the surveillance footage demonstrates that the plaintiff's foot missed the third step on the staircase. The defendants established that the plaintiff's fall on a staircase within the building was not caused by negligence on their part (see *Minor v. East Harlem Tutorial Program, Inc.*, 187 AD3d 408). In *Minor*, the First Department held that based on video surveillance footage and testimony, the plaintiff was distracted and missed a step, losing her balance as the plaintiff was descending a set of steps. Similarly, in *Burke v. Canyon Rd. Rest.*, 60 AD3d 558, the First Department granted summary judgment to defendants when the plaintiff missed a step while leaving defendants restaurant. The Court further noted "a court is not precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous"³³ (Id., quoting, *Cupo v. Karfunkel*, 1 AD3d 48, 52).

In opposition, the plaintiff failed to raise an issue of fact. In opposition, the plaintiff relies on *Dakers v. BFP Tower C. Co., LLC*, 208 AD3d 1128, 1129, in which the First Department denied defendants summary judgment motion based on the fact that the surveillance cameras were located high above a metal grate where the plaintiff fell and the Court noted that it was possible that moisture that allegedly caused the accident was not visible because the floor was made of white marble. The plaintiff argues that the video is far enough away that the liquid is not apparent and that the light color of the stairs could have obfuscated the liquid in the video. However, *Dakers* can be distinguished from the instant matter. In the instant matter, the plaintiff's foot can be seen missing the final step on the staircase. The plaintiff did not place his entire foot

on the third step and then slip, contradicting his testimony as to the cause of the accident. The testimony by the plaintiff contradicts the surveillance footage of the accident which shows a misstep by Mr. Martinez. The defendants have demonstrated that the plaintiff was the proximate cause of his own fall. Accordingly, the defendants motion for summary judgment dismissing the plaintiffs complaint is granted.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the defendants motion for summary judgment dismissing the plaintiffs complaint pursuant to CPLR 3212 is granted, and it is further,

ORDERED AND ADJUDGED, that the defendants shall serve a copy of this decision and order on the plaintiff within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: June 3, 2024



Hon. Paul L. Alpert, J.S.C.