

Mirra-Bruno v Speedway LLC
2024 NY Slip Op 35216(U)
January 4, 2024
Supreme Court, Bronx County
Docket Number: Index No. 29334/2019E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX-----X
GIANNA MIRRA-BRUNO,

Plaintiff,

-against-

SPEEDWAY LLC and SARLANIS
ENTERPRISES, LLC,Defendants.
-----X

GUZMAN, J.

DECISION & ORDER

Index No. 29334/2019E

Motion Sequence Nos. 3, 4

Plaintiff commenced this action to recover damages for personal inquiries she allegedly sustained as the result of a trip and fall accident at the the entrance of a Speedway gas station convenience store located at 355 East Tremont Avenue, Bronx, New York. At her deposition, Plaintiff testified that on February 2, 2017, upon entering the convenience store, her foot got stuck under a floor mat, causing her to fall to the floor and break her arm. She further testified that although she had been going to the location for several years, and saw the mat just prior to entering the convenience store, she did not notice that there was a raised portion of the mat prior to her accident. Plaintiff's accident was recorded by a video surveillance camera positioned inside of the store.

Defendant Sarlanis Enterprises, LLC ("Sarlanis") owned the property on the date of Plaintiff's accident. Sarlanis leased the premises to Defendant Speedway LLC ("Speedway") pursuant to a written lease agreement dated September 9, 2005, which was in effect on the date of Plaintiff's accident.

In Motion Sequence No. 3, Plaintiff's moves for an Order pursuant to CPLR § 3212 granting partial summary judgment on the issue of liability against Speedway and Sarlanis. In Motion Sequence No. 4, Defendants move for summary judgment dismissing the complaint on the grounds that (1) Sarlanis is an out-of-possession landlord and thus not liable for any conditions inside of the convenience store; (2) the floor mat did not constitute a dangerous condition as a matter of law; and (3) Speedway had no actual or constructive notice of any allegedly defective condition.

It is well-settled that “[t]he proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985). Because summary judgment is a “drastic remedy,” it should only be employed “when there is *no doubt* as to the absence of triable issues.” *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 (1974) (emphasis added). Issue-finding, not issue-determination, is the role of the court on a motion for summary judgment. *Lebedev v. Blavatnik*, 193 A.D.3d 175, 142 N.Y.S.3d 511 (1st Dep’t 2021). The court must view the evidence in the light most favorable to the non-moving party, and give the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012). If the moving party fails to meet this initial burden, summary judgment must be denied “regardless of the sufficiency of the opposing papers.” *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012)(internal quotation marks, citation and emphasis omitted).

Negligence is the failure to use reasonable care. A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition. *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976). Thus, to establish a prima facie case of negligence, a plaintiff must show the existence of a dangerous or defective condition that caused their injuries, and that the defendant either created the dangerous condition or had actual or constructive knowledge of the condition. *Robert v. Mahopac Cent. School Dist.*, 38 A.D.3d 514, 831 N.Y.S.2d 492 (2d Dep’t 2007).

Motion Sequence No. 3

In support of her motion for summary judgment, Plaintiff has submitted, *inter alia*, video footage of the subject accident, and five time stamped “still” photographs culled from the video which, according to Plaintiff, demonstrate that the floor mat “become and remain[ed] uneven, non-sturdy, and lifted off the ground for over one (1) hour before Plaintiff tripped over the mat, causing Plaintiff to trip and fall forwards and break her left arm.” *See* NYSCEF Doc. 66 at ¶ 21. Plaintiff further contends that “Defendant indisputably placed the mat at the entrance and negligently failed to either take appropriate steps to fix the raised portion of the mat or replace it

with a defect free mat” and “[h]aving irresponsibly failed to properly place, repair, or remove the mat, Defendant created the defect in question and should be held liable as a result.” *Id.* at ¶ 29.

This Court disagrees. The video footage does not conclusively demonstrate that the floor mat was non-sturdy or elevated from the ground, or otherwise clearly and unambiguously show that the mat constituted a dangerous or defective condition. *See, e.g., Derouen v Savoy Park Owner, L.L.C.*, 109 A.D.3d 706, 971 N.Y.S.2d 2 (1st Dep’t 2013). Although the still photographs from the video reflect that the mat had shifted to the left, the video is inconclusive as to whether the mat was in a raised condition, or raised at all, where Plaintiff’s stepped. *See Nicotra v. Giunta's Meat Farms, Inc.*, 214 A.D.3d 665, 182 N.Y.S.3d 911 (2d Dep’t 2023). Additionally, the contemporaneous video footage submitted by Plaintiff reflects that numerous customers and employees entered and exited the store and walked over the mat without incident prior to Plaintiff’s accident. “[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.” *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977, 665 N.Y.S.2d 615 (1997) (internal citation and quotation omitted). Here, the Court finds that Plaintiff has not eliminated all questions of fact as to the condition of the mat at the time of her accident.

Motion Sequence No. 4

As noted above, Defendants also move for summary judgment dismissing the complaint on the grounds that (1) Sarlanis is an out-of-possession landlord; (2) the mat did not constitute a dangerous condition as a matter of law; and (3) Speedway had no actual or constructive notice of any allegedly defective condition.

A landowner who transfers possession and control is generally not liable for injuries caused by dangerous conditions on the property. *Chapman v. Silber*, 97 N.Y.2d 9, 734 N.Y.S.2d 541 (2001). Exceptions to this general rule apply when the landlord is either contractually obligated to maintain the premises, or has a contractual right to re-enter, inspect, and make repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision. *Sapp v. S.J.C. 308 Lenox Ave. Family L.P.*, 150 A.D.3d 525, 527, 56 N.Y.S.3d 32 (1st Dep’t 2017) (an out-of-possession landlord “is generally not liable for negligence with respect to the condition of property. . . unless [it] is either

contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision). Plaintiff does not contest that Sarlanis is an out-of-possession landlord or otherwise oppose that branch of Defendants' motion seeking summary judgment on this basis. *See* NYSCEF Doc. 94 at ¶ 26. Accordingly, the complaint is dismissed insofar as asserted against Sarlanis.

Defendants next contend that the floor mat did not constitute a dangerous condition as a matter of law. According to Defendants, the mat was clearly visible to anyone making normal, expected observations while traversing the area, and did not constitute a dangerous or defective condition.

Under general principles of negligence, a defendant property owner has a duty to maintain its premises "in a reasonably safe condition in view of all of 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 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 568 (1976) (citation omitted). "Encompassed within this duty is the concomitant duty to warn those lawfully on the premises of potentially dangerous conditions that are not readily observable." *Fernandez v. Rutman*, 120 A.D.3d 545, 990 N.Y.S.2d 845 (2d Dep't 2014). A landowner has no duty to warn of an open and obvious danger, because if a danger is "open and obvious," a person entering the property is just as aware as the landowner of the condition of the property and the risks associated with it. *Cupo v. Karfunkel*, 1 A.D.3d 48, 767 N.Y.S.2d 40, 42 (2d Dep't 2003) (citation omitted). Proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for failing to maintain the property in a safe condition, but is relevant to the plaintiff's comparative negligence. *Id.* Nevertheless, the court may grant summary judgment to a landowner on the grounds that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous.

Defendants contend, and this Court agrees, that the floor mat at the store's entrance was clearly visible to anyone who was making normal and expected observations. Plaintiff herself testified that she had no difficulty seeing the mat upon entering the convenience store. Nevertheless, this is not the end of the inquiry. Defendants must also demonstrate, *prima facie*, that the floor mat was not inherently dangerous. Although the "inherently dangerous" inquiry is generally a question of fact for the jury, a court may conclude that no issue of fact has been

presented after examining the “width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury.” *Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997) (internal quotation marks and citation omitted). As discussed above, the video footage is not conclusive as to whether the floor mat, as positioned on the floor, was inherently dangerous, and Defendants have submitted no other proof on their motion. Accordingly, Defendants have not eliminated all triable issues of fact on the issue of whether the floor mat was in an inherently dangerous condition.

Finally, Defendants contend that any alleged defect was trivial and not actionable. A defendant seeking dismissal based on the trivial defect doctrine must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses.” *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 19 N.Y.S.3d 802, 810 (2015). In such instances, the court, not the jury, is responsible for “determin[ing] whether an alleged condition meets this triviality standard by reviewing “all the specific facts and circumstances of the case.” *Id.*

Although there is no “minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable,” *Trincere*, 90 N.Y.2d at 977, the Defendants herein have presented no proof of the physical characteristics of the floor mat, other than the video footage, which is inconclusive. Defendants have therefore failed to demonstrate, prima facie, that the condition was trivial as a matter of law. See *Nicotra v. Giunta's Meat Farms, Inc.*, 214 A.D.3d 665, 182 N.Y.S.3d 911 (2d Dep’t 2023).¹ The court also notes that Speedway has not established that it lacked actual or constructive notice of the alleged defective condition of the floor mat. Speedway has submitted no proof of when the floor mat was last inspected or whether there had been prior accidents as a result of the placement of the mat. Accordingly, it is hereby:

¹In *Nicotra*, a case factually indistinguishable from this action, the plaintiff tripped and fell over a floor mat in a grocery store. The accident was captured on surveillance video, which depicted numerous customers and employees walking over the mat and pushing carts over it without incident. The mat did not otherwise move or shift during the incident. Plaintiff and Defendant each moved for summary judgment. Defendant argued, *inter alia*, that the mat was open and obvious, it was not a dangerous or defective condition, and that any defect was trivial. The Supreme Court denied the plaintiff’s motion, finding that plaintiff had failed to establish the existence of a dangerous condition, and granted Defendant’s motion. The Appellate Division reversed, finding that the video footage of the accident was inconclusive as to whether the alleged defect concerning the mat was trivial and not actionable.

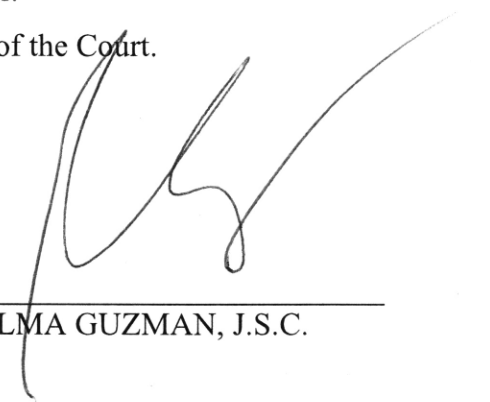
ORDERED AND ADJUDGED that Plaintiff's motion for summary judgment (Motion Sequence No. 3) is denied; and it is further

ORDERED AND ADJUDGED that the motion for summary judgment filed by Defendants Sarlanis Enterprises and Defendant Speedway LLC (Motion Sequence No. 4) is granted to the extent that the complaint is dismissed as to Sarlanis Enterprises, only; and the motion is otherwise denied; and it is further

ORDERED AND ADJUDGED that Defendants shall serve a copy of this Order with Notice of Entry within thirty days of Entry of this Order.

The forgoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
January 4, 2024



HON. WILMA GUZMAN, J.S.C.