Baird v CVS Albany, LLC

2025 NY Slip Op 35370(U)

March 12, 2025

Supreme Court, Westchester County

Docket Number: Index No. 57775/2022

Judge: Thomas Quiñones

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 – I.A.S. PART

PRESENT: HON. THOMAS QUIÑONES, J.S.C.

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DARLENE BAIRD,

Plaintiff(s)

-against-

CVS ALBANY, LLC,

Defendant(s).

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DECISION AND ORDER

Index No. 57775/2022
Motion Sequence No. 2

The following papers filed to the New York State Court Electronic Filing System (NYSCEF) as NYSCEF Doc. 39-65 were read and considered on Defendants' motion pursuant to CPLR 3212 granting summary judgment in favor of Defendant, thereby dismissing Plaintiff's complaint in its entirety.

Upon the foregoing papers, the motion is determined as follows:

This action arises out of a trip and fall incident that occurred on July 16, 2021, on the exterior sidewalk in front of the front doors to the CVS store located at 1827 Main Street, Peekskill, New York. According to Plaintiff, she was caused to trip and fall when she pushed her cart into the CVS store, due to dangerous and/or defective conditions with respect to the subject sidewalk, entranceway, entrance/vestibule saddle, and/or shopping cart and its wheels. As to procedural posture of this case, a fully executed Trial Readiness Order was filed on September 23, 2024 confirming discovery completion, and a Note of Issue was filed on September 24, 2024 certifying trial readiness.[1] Accordingly, Defendant's dispositive motion is ripe for determination.

Defendant's Motion:

Defendant filed the instant motion pursuant to CPLR §3212 granting summary judgment in favor of Defendant, thereby dismissing Plaintiff's complaint in its entirety. It is Defendant's contention that the Plaintiff failed to identify the exact cause of the alleged incident, which is fatal to her claim. Furthermore, Defendant contends that the condition of the sidewalk, entranceway, and vestibule saddle, on the exterior of the subject CVS store was not hazardous, dangerous, nor defective in any manner to have caused the alleged occurrence and complied with all New York State Building

[1] NYSCEF Doc. 35, 36 respectively.

and Transportation Codes and property codes. Counsel states that there were no obstructions or lighting inadequacies that hindered Plaintiff's ability to see in front of her at the time of the occurrence. Therefore, the alleged condition of the sidewalk, vestibule saddle and entranceway were not in a dangerously defective condition, or, at best, any such condition was de-minimis and not actionable as a matter of law. Furthermore, counsel contends that the subject shopping cart used by Plaintiff at the time of the incident was fully operational and functional, including its wheels. In furtherance of Defendant's position, counsel submits, amongst other evidence, the CVS store surveillance video via CD-ROM, which counsel suggests depicts the Plaintiff leaning on the shopping cart as she entered the subject CVS store, causing it to topple over as it approached the vestibule.[2]

Plaintiff's Opposition:

Plaintiff filed opposition to the instant motion. It is Plaintiff's contention that "there are triable issues of fact on whether the defect at issue constituted a dangerous condition of which the movant should have had notice of, and which was negligently left unaddressed."[3] First, counsel contends that the parties proffered differing factual accounts of the happening of the incident, thus raising an issue of fact as to credibility to be resolved by a jury.[4] Second, counsel contends that plaintiff's expert engineer, Harold Krongelb, P.E., analyzed, amongst other things, the CVS store surveillance video and performed a site visit, upon which Krongelb opined within a reasonable degree of engineering certainty, that the doorway threshold was elevated by up to ⅜-inch above the abutting concrete walkway in violation of various cited New York State building, property management, and fire code(s) caused Plaintiff's shopping cart to overturn and caused Plaintiff to fall.[5] Third, counsel contends that Plaintiff adduced competent evidence to give rise to triable issues of fact. Counsel rejects Defendant's argument that Plaintiff did not identify the cause of the fall. To the contrary, counsel cited portions of Plaintiff's deposition testimony as to the happening of the incident as well as the Plaintiff's engineer affidavit which opined to the defective condition posed by the elevated doorway threshold caused the fall.[6] Specifically, counsel cited to the following portion of Plaintiff's deposition testimony:

> "As I proceeded to go into the store and pushing the cart the two doors opened, one to the left, one to the right just went sideways and the right wheel of the front of the cart went over the saddle because I was going in at an angle, and as I'm pushing all of a sudden the cart got stuck, it stopped abruptly and it started to tip over and I was holding onto it tight to stop it but it took me with it. It went to the ground, I landed very hard on my left hip with the cart on top of me. And I couldn't move."[7]

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[2] NYSCEF Doc. 53, Defendant's Motion Exhibit J submitted by CD-ROM.
[3] NYSCEF Doc. 41, Plaintiff's Attorney K. Peshtani Aff. ¶3.
[4] *Id.* at ¶7.
[5] *Id.* at ¶¶8-30.
[6] *Id.* at ¶¶41-44, citing Defendant's Motion Exhibit H [Plaintiff's EBT at pg. 31] and Plaintiff's Exhibit A [H. Krongelb engineer affidavit].
[7] Defendant's Motion Exhibit H [Plaintiff's EBT at pg. 31 at lines 11-23].

The Court advises that all other arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Decision:

It is well settled that the proponent of a motion for summary judgment 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 (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr*., 64 NY2d at 853). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (*Alvarez v Prospect Hosp.*, 68 NY2d at 324).

In the context of a premise liability case, [l]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property" (*Donatien v Long Is. Coll. Hosp.*, 153 A.D.3d 600, 600-601 [2d Dept. 2017]). "Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury." *(Dillon v. Town of Smithtown*, 165 A.D.3d 1231, 1232 [2d Dept. 2018] [citations omitted]).

In this case, there are conflicting factual accounts as to the happening of the incident (i.e., whether there is a raised vestibule doorway threshold which caused the shopping cart to topple over as suggested by Plaintiff, versus whether Plaintiff leaned on the cart causing it to topple over as suggested by Defendant). Accordingly, Summary judgment must be denied where, as here, there is conflicting testimony as to the happening of the accident (*Lee v Hossain*, 111 AD3d 799 [2d Dept. 2013]). Moreover, where, as here, the parties proffered competing experts as to the existence of the alleged defective condition(s) and cause(s) of the Plaintiff's fall,[8] same likewise raise issues of fact to be resvoled by a trier of fact.

Based on the foregoing, it is hereby

ORDERED that, Defendant's motion for summary judgment is denied for the reasons herein stated. It is further

[8] *See*, NYSCEF Doc. 68 (Plaintiff's expert affidavit re: Harold Krongelb, P.E.) and NYSCEF Doc. 58 (Defendant's expert disclosure re: David Behnken, P.E.).

ORDERED that the Judge's Part Clerk will issue a separate court notice scheduling a Pre-Trial Settlement Conference shortly.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 12, 2025
White Plains, New York

E N T E R :

HON. THOMAS QUIÑONES, J.S.C.

TO: *Filed to NYSCEF*