Williams v Office Ctr. at Mitchell Field Condominium
2012 NY Slip Op 33246(U)
September 6, 2012
Supreme Court, Nassau County
Docket Number: 6149/10
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

BARBARA WILLIAMS

Plaintiff,

-against-

MOTION SEQ. NO.: 003
MOTION DATE: 6/5/12

THE OFFICE CENTER AT MITCHELL FIELD CONDOMINIUM, MITCHELL OAK STREET ASSOCIATES, L.P. AND WEN MANAGEMENT COMPANY, INC. AND "377 OAK CONDOMINIUM OWNER'S CORPORATION", A FICTITIOUS NAME INTENDED TO REPRESENT THE OWNER OF THE COMMON ELEMENTS AT 377 OAK STREET, GARDEN CITY, NY,

INDEX NO.: 6149/10

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion for Summary Judgment...1
Affirmation in Opposition..2
Reply Affirmation..3

Motion by defendants, The Office Center at Mitchell Field Condominium and Wen Management Company, Inc., for an Order, pursuant to CPLR 3212, granting them summary judgment dismissal of plaintiff's complaint is determined as follows.

This is an action in negligence by plaintiff, Barbara Williams, to recover for personal injuries she allegedly sustained on March 27, 2007 at approximately 2:00 p.m., when she tripped and fell as a result of her foot getting caught in an "expansion joint" in the curb of the property owned by non-party, County of Nassau, leased by the defendant The Office Center at Mitchell Field Condominium (referred to herein as the "Office Center") and managed by the defendant Wen Management Company ("Wen").[1] The

[1]Counsel for the plaintiff avers in his affirmation in opposition that this action was previously discontinued, by stipulation, as against defendant Mitchell Oak Street Assocs., L.P. Notably, the stipulation has not been furnished to this Court.

plaintiff claims that the "expansion joint" was on the curb itself, and not on the sidewalk or where the sidewalk met the curb (Williams Tr., pp. 45-46, 49). She testified that the middle part of her right shoe somehow got "stuck" in the "joint," causing her to fall forward (*Id.* at 45, 56).

Plaintiff stated that she arrived at the subject premises on the day of her accident at approximately 10:00 a.m. to attend a deposition for a prior, unrelated personal injury action. She parked in the parking lot on the east side of the building, approximately 60 feet away from the main entrance, located on the building's east side. She stated that when she left her car, she walked directly to the main entrance of the building and walked up a small ramp to the flat ground/sidewalk immediately adjacent to the entrance doors. She had been to the property one time before the date of her accident and on that prior occasion, she had parked in the same parking lot and entered through the same entrance, walking the same path.

Her accident occurred approximately three hours later as she was exiting the building. On the two separate occasions when the plaintiff had entered the building, prior to her accident, she had done so without incident. Plaintiff claims that her fall occurred approximately 10 steps from the building's main entrance doors. Plaintiff denied being able to recall if she ever looked down at her feet from the time she exited the building to the time her accident occurred (*Id.* at 44). She claims that she was about to step down off the entranceway sidewalk, onto the adjacent driveway/parking lot surface, when her foot got caught in an "expansion joint" in the curb (*Id.* at 45-46, 49).

Although plaintiff claims that the middle part of her right shoe somehow got stuck in the expansion joint, causing her to fall forward, she admitted at her deposition that she never actually saw the alleged "expansion joint" prior to her fall (*Id.* at 55). Furthermore, not only did plaintiff deny observing the alleged "joint" before her fall, she also testified that she did not look at the subject curb at any time after her fall (*Id.* at 60, 112). Plaintiff also denied making any complaints to anyone at the premises about the alleged condition prior to her accident. She similarly denied being aware of any prior accidents having occurred in that particular area of the premises (*Id.* at 111). She did not take any photographs of the alleged defect and she does not know of any photographs that depict the alleged defect (*Id.* at 77-78).

Russel Mohr, Vice President of Wen Management, testified of behalf of the defendants and explained that the Office Center is run by a board of managers who are responsible for the common areas of the property. Mohr testified that if any defects were observed in the walkways surrounding the building, the matter would be brought to the attention of the board of mangers and the repairs would usually be assigned to an outside

contractor (Mohr Tr., pp. 12-15). He stated that he would have been the person responsible for supervising and assigning the contracts for any repair work to the parking lot area, if any such work had been necessary (*Id.* at 24). Mohr testified that he was not aware of anyone complaining about the conditions of any curbs or sidewalks on the east side of the premises prior to the date of plaintiff's accident (*Id.* at 31). He stated that a search of the defendants' records was performed and no prior complaints or incidents were noted (*Id.* at 31-32).

Upon the instant motion, defendants The Office and Wen, seek summary judgment dismissal of the plaintiff's complaint.

Defendants assert two bases for the entitlement to summary judgment. First, that plaintiff cannot prove that the alleged defect proximately caused her accident. Second, the defendants neither created the alleged defect nor had notice of the alleged defect prior to the plaintiff's accident. Based upon the defendants' submissions herein, including the sworn testimony of the plaintiff herself and the deposition transcript of Russel Mohr, this Court finds that the defendants have made a prima facie showing of entitlement to judgment as a matter of law.

First, the Courts note at the outset that although the plaintiff in this case professes that her foot got caught in an "expansion joint," the record – her own sworn testimony – establishes that she has no reasonable basis for making such a claim. She denied observing the alleged "expansion joint" prior to her fall and similarly denied observing the alleged "expansion joint" after her fall. She has provided no photographs of the alleged defective "expansion joint" nor has she submitted any other admissible evidence to substantiate the cause of her fall. In light of her failure to demonstrate that the alleged defect caused her to fall, much less that the negligence of the defendant proximately caused her injury, her negligence claim simply fails (*Teplitskaya v. 3096 Owners Corp.*, 289 AD2d 477 [2nd Dept. 2011]; *Louman v. Town of Greenburgh*, 60 AD3d 915 [2nd Dept. 2009]).

Plaintiff's argument in opposition that the alleged condition had "trap-like" characteristics, because of it's coloring, is not only meritless it is without basis rising to the level of frivolous. It appears to the Court that no investigation was made of the location of the fall and the claim is based on surmise and conjecture. First and foremost, the plaintiff testified that she could not recall whether she ever looked down at her feet from the time she left the subject building until the time of her fall. Second, she testified that she did not look at the subject curb at any time. Her claim, therefore, that the "color" of the alleged defect created a "trap-like" condition is clearly baseless. This Court will not permit the plaintiff to "avoid summary judgment by alleging issues of fact created by [a]

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self serving affidavit[] contradicting prior sworn deposition testimony" (*Marcelle v. New York City Transit Authority*, 289 AD2d 459 [2nd Dept. 2001]; *Nieves v. ISS Cleaning Servs. Group*, 284 AD2d 441 [2nd Dept. 2001]).

In the absence of any evidence defeating defendants' prima facie entitlement to judgment as a matter of law, the motion for summary judgment is **granted**.

The parties remaining contentions have been considered and do not warrant discussion.

The complaint is **dismissed**. Settle Judgment on Notice.

This constitutes the decision and order of this Court.

Dated: 9/6/12

J.S.C.

ENTERED
SEP 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE