Aybar v 233 Broadway Residential, LLC
2016 NY Slip Op 30455(U)
February 29, 2016
Supreme Court, Bronx County
Docket Number: 308663/2012
Judge: Betty Owen Stinson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1] FILED Mar 01 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

---X

LINA AYBAR,

Plaintiff, INDEX № 308663/2012

-against- DECISION/ORDER

233 BROADWAY RESIDENTIAL, LLC,

Defendant.

---X

HON. BETTY OWEN STINSON:

This motion by defendant for renewal of a motion decided by this court's Order dated November 10, 2015 is granted, and upon renewal, defendant's motion for summary judgment dismissing the complaint is granted. This court in its original Order misapprehended the procedural posture of the case, finding that discovery had not been completed. With its motion for renewal, defendant provided a dated copy of the Note of Issue and Certificate of Readiness.

As for defendant's previous motion for summary judgment, the following facts are not in dispute. On September 16, 2010, the 72-year-old plaintiff was discovered lying on the sidewalk with her forehead bleeding in front of 233 Broadway in Manhattan. The sidewalk in that location has granite plaques inlaid in the sidewalk every several feet commemorating World Series wins by the New York Yankees. A report of plaintiff's fall by a security guard reflected that, "when asked, Ms. Lina Aybar could not recall how she got to the floor". Plaintiff was taken to Bellevue Hospital for evaluation the same day and the emergency department report records the admitting and principal diagnosis as "syncope (fainting) and collapse".

Plaintiff commenced a complaint against the building abutting the sidewalk, alleging the building owners failed to maintain the sidewalk in a safe condition in that they had actual and constructive notice of a dangerous crack in the sidewalk that caused plaintiff's fall. After completion of discovery, defendant made the motion for summary judgment dismissing the complaint for lack of liability in that there is no evidence of an actionable defect on the sidewalk and the named defendant is not the owner of the premises.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). If the moving party fails to meet its burden, the motion must be denied regardless of the sufficiency of the non-moving party's opposition (*id.*).

The owner of land or a building has a duty to exercise reasonable care to keep the premises in a safe condition under all the circumstances, including the likelihood of injury to others, the seriousness of potential injury and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233 [1976]). What constitutes a hazardous condition is normally an issue of fact for the jury (*Greaves*

v Bronx YMCA, 87 AD2d 394 [1982]). When, however, it is concluded that there is no reasonable view of the evidence upon which to assess liability, the question is one of law for the court (*id.*). The mere happening of an accident does not establish liability (*Lewis v Metropolitan Transportation Authority*, 99 AD2d 246 [1st Dept 1984], *aff'd* 64 NY2d 670 [1984]).

To establish a *prima facie* case of negligence in a trip and fall case, a plaintiff must prove the defendant had actual or constructive notice of the dangerous or defective condition and sufficient time within the exercise of reasonable care to correct or warn about its existence (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Constructive notice can be established if there is evidence the defect was visible and apparent and in that condition for a sufficient length of time that the defendant is presumed to have seen it or was negligent in failing to see it (*id.*).

In support of the motion, the defendant offered copies of the pleadings, the bill of particulars, the incident report by a building security guard, the hospital records from Bellevue Hospital as set forth above, photographs of the sidewalk, a description of the area known as the Canyon of Heroes from the website of the Downtown Alliance, and the deposition testimony of plaintiff and of Victor Baffa. The granite inserts were clearly visible in the photographs, but no defects were discernable, either in the copies of photographs offered with this motion or in the photographs initially provided to the court with the original motion.

Plaintiff testified that "when you fall . . . you don't really know exactly where it happened" (deposition of Lina Aybar, May 15, 2013 at 35). She was reluctant to circle the "crack" where she fell because she was "not too sure" (*id.* at 36). She did finally circle an area of sidewalk on the photographs and she testified that the "crack" on which she fell was two to three inches in height

(*id.* at 22-23).

Victor Baffa testified that he was an employee of non-party 233 Broadway Owners, LLC, and *not* the defendant 233 Broadway Residential, LLC (deposition of Victor Baffa, October 7, 2013 at 6). He was employed as the building manager of the mixed use building, and it was the responsibility of his employer, non-party 233 Broadway Owners, LLC, to maintain and repair the sidewalk (*id.* at 11). He testified that an organization called the Downtown Alliance also maintains and repairs the sidewalks and the granite inserts as the area is part of the "Canyon of Heroes" (*id.* at 17-21). Baffa received no complaints with respect to the sidewalk flags being uneven (*id.* at 25). He received no complaints about the sidewalk's condition at any time (*id.* at 24-25).

In opposition to the motion, plaintiff argued that plaintiff was never asked about the incident report during her deposition and it is therefore of "no import". Plaintiff argued that the hospital record is consistent with her testimony and therefore also of no import, and that her fall had nothing to do with granite plaques, but rather with a raised portion of sidewalk. Plaintiff did not address Victor Baffa's testimony as to ownership of the subject property.

Defendant has established its entitlement to summary judgment which the plaintiff has not refuted with admissible evidence. It is possible that plaintiff's testimony, although extremely equivocal, could give rise to an issue of fact as to the existence of a defect in the sidewalk, despite the lack of any other evidence in support. Plaintiff, however, does not dispute the evidence that the named defendant is *not* the owner of the premises. Thus, defendant unquestionably has no duty to the plaintiff with respect to any possible condition on the subject sidewalk and the complaint against it must therefore be dismissed.

Movant is directed to serve a copy of this order on the Clerk of Court who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: February 29 , 2016
Bronx, New York

BETTY OWEN STINSON, J. S.C..