Atkinson v Key Real Estate Assocs.
2016 NY Slip Op 30744(U)
April 19, 2016
Supreme Court, New York County
Docket Number: 104274/2011
Judge: Arlene P. Bluth
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FA 4/20/16 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ARLENE P. BLUTH J.S.C. PART 32
Justice

Index Number : 104274/2011
ATKINSON, JEANNE
vs
KEY REAL ESTATE ASSOCIATES
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits + further reply affirmation, + supplemental memo | No(s). 3, 4, 5

Upon the foregoing papers, it is ordered that this motion is Denied.

See accompanying decision/order.

FILED
APR 20 2016
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NEW YORK

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Next Conf: 9-13-16
2:30 pm

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/19/16

_____, J.S.C.
ARLENE P. BLUTH
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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JEANNE ATKINSON,

Index No. 104274/2011
Motion Seq: 004

Plaintiff,

- against-

KEY REAL ESTATE ASSOCIATES, LLC and 40TH STREET TENANTS CORPORATION,

DECISION/ORDER
ARLENE P. BLUTH, JSC

Defendants.

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The motion by defendants Key Real Estate Associates, LLC and 40th Street Tenants Corporation (defendants) for summary judgment dismissing plaintiff's complaint is denied.

This cases arises out of a personal injury allegedly suffered by plaintiff on April 9, 2008 at 32 West 40th Street in New York, NY. Plaintiff claims that she tripped and fell while descending three steps in a vestibule which led to a foyer and the outside entrance to the building. Plaintiff alleges that her two-inch heel caught on the raised edge of a metal bull-nosing of the upper-most step. Plaintiff alleges that she fell forward as a result of the bull-nosing on these steps. There were no handrails on these three steps at the time of the accident.

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers

(*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Trivial Defect

"[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 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). "Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*id.*). A court must examine "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury" (*id.* at 978).

"There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises . . . and even a trivial

defect may constitute a snare or trap" (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166, 716 NYS2d 657 [1st Dept 2000] [internal citations omitted]). "While a gradual, shallow depression is generally regarded as trivial the presence of an edge which poses a tripping hazard renders the defect nontrivial" (*id.* [internal citations omitted]).

"A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). "The relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (*id.* at 80).

In support of their motion, defendants claim that the alleged defect that plaintiff tripped over is trivial and therefore plaintiff's claim is not actionable. Defendants assert that plaintiff acknowledged that the metal strip protruded about 1/4 of an inch to 1/8 of an inch above the top step. Defendants also claim that the building superintendent asserted that the bull-nosing on the vestibule steps was 1/8 of an inch above the step. Defendants proffer the expert affidavit of Mr. Fein, who concludes that the "steps were built and maintained in accordance with good and accepted engineering safety practice" (affidavit of Stanley Fein, ¶ 6).

Defendants cite cases for the proposition that a hazard containing a small height difference constitutes a trivial defect (*see e.g., Hutchinson v Sheridan Hill House Corp.*, 110 AD3d 552, 553, 973 NYS2d 178 [1st Dept 2013] *affd* 26 NY3d 66 [2015] [holding that a metal screw that protruded about 3/16 of an inch above the surface of the sidewalk was insufficient to

establish the existence of a dangerous or defective condition]; *Mangar v Parkash 180 LLC*, 99 AD3d 607, 607, 952 NYS2d 446(Mem) [1st Dept 2012] [holding that a half-inch height differential at the top of a two-step exterior stairway was trivial]).

Defendants have met their prima facie burden in support of their motion for summary judgment. The burden now shifts to the plaintiff to raise a triable factual question.

In opposition, plaintiff claims that a jury must decide whether or not the brass bull-nosing on the stairs was a trivial defect. Plaintiff submits an affidavit from Dr. Shankman, who concludes that the brass bull-nosing on each step caused a hazard by "installing and not recessing the cited brass nosing" (affidavit of Dr. Jay Shankman, ¶ 10). Dr. Shankman also claims that defendants violated a number of building code violations, such as "section 27-113 and 27-375 by not installing handrails in around or about either side of the [stairs]" (*id.* ¶ 7). Dr. Shankman further asserts that the installation of handrails would have allowed plaintiff to stabilize her fall and to minimize her injuries (*id.* ¶ 9). Dr. Shankman concludes that plaintiff's accident was caused by the brass bull-nosing (*id.*).

Plaintiff has raised an issue of fact regarding whether the alleged defect was trivial. Although the alleged defect is a raised edge measuring only 1/8 of an inch to 1/4 of an inch, the facts and circumstances surrounding plaintiff's trip and fall raise an issue of fact regarding whether the alleged defect was trivial. Visitors and residents of the building must travel down these steps if they leave the building through this exit. A jury might find that plaintiff, wearing two-inch heels, faced a non-trivial tripping hazard from the raised edge on the top step.

Administrative Code Violation

Plaintiff has also raised an issue of fact regarding a possible violation of the Administrative Code of the City of New York. Although "a violation of a statute promulgated by the State Legislature constitutes negligence as a matter of law, the rules of an administrative body or even the ordinances of a municipality lack the force and effect of a substantive legislative enactment and, therefore, violations thereof are merely evidence of negligence" (*Bjelicic v Lynned Realty Corp.*, 152 AD2d 151, 154, 546 NYS2d 1020 [1st Dept 1989] [internal quotations and citations omitted]).

Here, plaintiff claims that defendants violated the Administrative Code of the City of New York § 27-375 by not installing handrails on the stairs in the vestibule. Plaintiff has raised an issue of fact. Administrative Code § 27-375 (f)(1) provides that "Stairs more than eighty-eight inches wide shall have intermediate handrails dividing the stairway into widths that maintain the nominal multiples of twenty-two inches, but the widths shall not be greater than eighty-eight inches nor less than forty-four inches." Plaintiff's expert claims that the steps measure 136 inches in width (affidavit of Dr. Jay Shankman, ¶ 5). This requirement applies to interior stairs, which is defined as "a stair within a building, that serves as a required exit" (Administrative Code § 27-232).

Defendants claim that *Cusumano v City of New York*, (15 NY3d 319, 910 NYS2d 410 [2010]) requires the Court to find that the stairs at issue are not "interior stairs" and therefore defendants were not required to comply with the provisions of Administrative Code § 27-375. However, the stairs in *Cusumano* were used "as a means of walking from the first floor to the

basement" (*id.* at 324) rather than to an exit from the building. Defendants further claim that these stairs are not "interior" because they lead to a foyer or vestibule landing rather than an exit.

The Court is unable to conclude that Administrative Code § 27-375 is inapplicable because plaintiff's photographs indicate that the stairs at issue *do* lead to an exit in front of the building (affirmation of plaintiff's counsel, exhibit 2). The foyer cited by defendants appears to constitute a landing between the entrance/exit of the building and the beginning of the stairs (*id.*). Plaintiff would have had to travel down these steps in order to exit the building. Because the stairs in the instant action are in excess of 88 inches and lead to a building exit, there is an issue of fact as to whether the lack of handrails may have contributed to plaintiff's injury.

Accordingly, it is

ORDERED that the motion for summary judgment by defendants Key Real Estate Associates, LLC and 40th Street Tenants Corporation is denied.

This constitutes the Decision and Order of the Court.

Dated: April 19, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC