SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 59

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MARK SCHMIDT,

Plaintiff,

Index No. 151406/2013

-against-

ONE NEW YORK PLAZA CO., BROOKFIELD OFFICE PROPERTIES, INC., BROOKFIELD PROPERTIES OFFICE PARTNERS, INC., and BROOKFIELD PROPERTIES OFFICE PARTNERS, LP,

Defendants.

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Debra A. James, J.:

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint based upon the defense that defendants were not negligent in their control over the accident location.

Underlying Allegations

Plaintiff alleges that, on February 27, 2012, at 2 p.m., he was working as a security guard for Michael Stapleton Associates (MSA) at the loading dock in a building located at One New York Plaza, New York, New York (the Accident Site). At his deposition he testified that, as part of his security work, he was walking with his dog, inspecting incoming trucks for potential explosive hazards. He contends that while he walked down the ramp from the loading dock, an unidentified man with a pallet was coming up the ramp to the loading area, requiring plaintiff to shift his position towards the ramp's edge, to permit the man to pass.

Plaintiff further states that there was a railing on the ramp's edge, but that when he shifted his position, the railing was not there, causing him to fall approximately one and a half feet to the ground and he suffered a twisted left ankle.

Plaintiff asserts that the absence of railing on the ramp's edge was a dangerous and defective condition that caused his fall.

Brookfield Office Properties, Inc. (Brookfield) admits ownership of the Accident Site and that plaintiff was working there as a bomb detection guard for a K9 security company, MSA. The motion papers before the court contain regarding Brookfield Properties Office Partners, L.P. or Brookfield Properties Office Partners, Inc. Brookfield has proffered the affidavit of an architect, Douglas Peden (Peden), who states that the ramp did not violate the applicable Building Code or any OSHA rule. The Peden affidavit does not mention anything concerning industry standards for ramps and railings.

Brookfield seeks summary dismissal of plaintiff's complaint, contending that it has established that the ramp was not a dangerous or defective condition and that plaintiff's "fai[ure] to make reasonable observations of the edge conditions of the ramp . . . was the cause of the accident".

Summary Judgment Standard

A party seeking summary judgment must make a prima facie

case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (Id.). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (Branham v Loews Orpheum Cinemas, Inc., 8 NY3d 931, 932 [2007]; Dauman Displays v Masturzo, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (Sommer v Federal Signal Corp., 79 NY2d 540, 555 [1992]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (Peralta v Henriquez, 100 NY2d 139, 144 [2003]). Additionally, in order to be held liable, a party must be aware

of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (Ross v Betty G. Reader Revocable Trust, 86 AD3d 419, 421 [1st Dept 2011]; Amendola v City of New York, 89 AD3d 775, 775 [2d Dept 2011]; Schiano v Mijul, Inc., 79 AD3d 726, 726 [2d Dept 2010]).

Expert Evidence of Negligent Design

"The absence of a violation of the New York City Building Code may not always establish, as a matter of law, the absence of negligent design. . . . [and o]ther types of industry-wide standards may be applicable to determine whether a party was negligent" (Hotaling v City of New York, 55 AD3d 396, 398 [1st Dept 2008], affd 12 NY3d 862 [2009]; see also Etheridge v Marion A. Daniels & Sons, Inc., 96 AD3d 436, 437 [1st Dept 2012]).

However, merely "point[ing] to gaps in plaintiff's proof instead of carrying [its burden] on [the] motion [for summary judgment warrants denial of the motion]" (Torres v Merrill Lynch Purch.,

95 AD3d 741, 742 [1st Dept 2012]).

Discussion

Applying the above principles to this motion, Brookfield's motion must be denied. The Peden affidavit only addresses the New York City Building Code and OSHA regulations, but does not mention industry-wide standards. However, "[t]he absence of a violation of the New York City Building Code may not always establish, as a matter of law, the absence of negligent design. . . . [and o]ther types of industry-wide standards may be applicable to determine whether a party was negligent" (Hotaling, 55 AD3d at 398; see also Ashton v EQR Riverside A, LLC, 132 AD3d 599, 600 [1st Dept 2015]; Nielsen v 300 East 78th Street Partners, Inc., 111 AD3d 414, 415 [1st Dept 2013]). As the movant, Brookfield has the initial burden of demonstrating entitlement to judgment as a matter of law (*see Ross*, 86 AD3d at 421; see also Briggs v Pick Quick Foods, Inc., 103 AD3d 526, 526 [1st Dept 2013]). Since it has failed to do so, its motion must be denied.

Accordingly, it is, therefore,

ORDERED that defendants' motion for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference before part Mediation-1 on February 16, 2017, and if the case is not settled there or at

any adjourned continuing mediation conference, the parties are to appear for a pre-trial conference before this court on May 2, 2017 at 2:30 P.M. in Part 59, Room 331, 60 Centre Street, New York, New York 10007 to set a trial date.

Dated: January 25, 2017

ENTER:

J.S.C.

DEBRA A. JAMES