

<b>Graham v AMDA Inc.</b>
2017 NY Slip Op 30458(U)
March 7, 2017
Supreme Court, New York County
Docket Number: 160072/13
Judge: Manuel J. Mendez
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT:** MANUEL J. MENDEZ  
*Justice*

**PART 13**

KATHRYN GRAHAM,

Plaintiff

INDEX NO. 160072 /13

MOTION DATE 01-11-2017

- Against-

AMDA INC., MANHATTAN STRATFORD ARMS,  
INC., and BOMBARD MANAGEMENT, LLC,

Defendants.

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-2

3-4

5

**Cross-Motion:**  Yes  No

Upon a reading of the foregoing cited papers, it is ordered that this motion for summary judgment is granted, the complaint is dismissed.

Plaintiff brings this action to recover damages for personal injuries sustained on June 26, 2013 as a result of a slip and fall on an outdoor deck connected to defendants' premises. Plaintiff claims that while she was lawfully traversing an outdoor deck she was caused to slip and fall due to hazardous, defective, slippery, improperly cleaned and unsafe deck. Defendants move for summary judgment dismissing the complaint alleging that the plaintiff cannot establish a prima facie case of negligence against the defendants as no dangerous or defective condition existed which the owner created or had actual or constructive knowledge about. Defendants allege that the deck is not inherently dangerous, that they did not create a dangerous condition or had actual or constructive notice of a dangerous or defective condition.

Defendants' moving papers contain a copy of plaintiff's deposition, copies of the depositions of Lindsey Kate Graham ( plaintiff's daughter), of Debra Ambrosino (Plaintiff's sister), a copy of the deposition of Dennis Abenanty and Jesus Padilla- on behalf of the defendants - and copies of photographs where the accident occurred.

On June 26, 2013 plaintiff and her sister Ms. Ambrosino, were visiting plaintiff's daughter at the premises. Sometime after 5:00 PM they all went out to dinner at a neighborhood diner. While at dinner there was a downpour of rain. After the rain stopped the sun came out and it is not clear if by the time they left the diner the streets and sidewalk were still wet or were dry. Sometime after 8:00PM they returned to the premises and the daughter decided to show them the premises. At approximately

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

**8:45 PM they entered the deck area from the computer room and as the plaintiff was walking toward the other side of the deck from where she entered- with a cup of ice coffee in her hand- she slipped and fell backwards. According to plaintiff she had not been on the deck more than ten (10) to fifteen (15) seconds before she fell.**

**Plaintiff's daughter and her sister were directly behind her when she fell and do not know what caused her to fall. Plaintiff doesn't know exactly what she slipped on. She knows she slipped on something very slippery, very slimy, like a slime. She noticed leaves in the area where she fell but could not say if there were any under her after she fell. Once she fell plaintiff noticed that the deck was wet. ( see Exhibits G, H, I deposition of plaintiff, her daughter and her sister, and Exhibit L, Photographs).**

**The deck was built in 2005 and contains one large tree in the center. It would be opened each morning by one of the maintenance staff members and closed at 10:00 PM each night by the building security guard. It was cleaned Mondays, Wednesdays and Fridays by sweeping and hosing it down before it was opened on those mornings. After it was cleaned signs would be placed letting the patrons of the building know that it had just been hosed down. Each afternoon around 3:00PM the deck would be checked and swept again if necessary. During rainstorms the deck would be closed and no signs would be placed, or the deck swept after a rainstorm. On the night of the accident there had been a rainstorm that ended prior to 6:00 PM. ( see Exhibits E, J, and K).**

**Defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff cannot establish a prima facie case of negligence against the defendants as no dangerous or defective condition existed which the owner created or had actual or constructive knowledge about.**

**Plaintiff opposes the motion and argues that defendants have failed to make out a prima facie case entitling them to judgment as a matter of law. Plaintiff also argues that there exists an issue of fact as to whether defendants neglected to maintain their property in a reasonably safe condition or exercised reasonable care to avoid creating a hazardous condition. Plaintiffs claim that there are questions of fact for a jury to decide, such as, since defendants had this specific Trex deck for a number of years they had notice of the recurrent leaves on the deck, and by their own admissions improperly cleaned the deck contrary to the manufacturer's guidelines. This failure to properly clean the deck may have caused "a film of mold and or algae most likely [to] exist] at the time of this accident. Furthermore, defendants' practice of never placing warning signs after a rainfall on a leaf covered plastic deck is a failure to warn of a trap.**

**In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d**

**583; Martin V. Briggs, 235 192).**

**It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966]; Sillman v. 20<sup>th</sup> Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957]; Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is “issue finding” not “issue determination” ( Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve ( Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).**

**To impose liability upon a defendant in a slip and fall action, there must be evidence tending to show the existence of a dangerous or defective condition and that the defendants either created the condition or had actual or constructive knowledge of it ( Richardson v. Campanelli, 297 A.D. 794, 748 N.Y.S.2d 31 [2<sup>nd</sup>. Dept. 2002]). As such summary judgment has been granted to a defendant dismissing the Slip and Fall claim where the accident occurred in a terrace exposed to the elements which was wet due to an earlier rain storm ( Gringberg v. Luna Park Housing Corporation, 69 A.D. 3d 793, 891 N.Y.S. 2d 910 [2<sup>nd</sup>. Dept. 2010]); where the accident occurred on a staircase leading to the front entrance of a building and at the time of the accident the staircase was wet from rain (Morgan v. City of New York, 59 A.D. 3d 412, 872 N.Y.S. 2d 543[ 2<sup>nd</sup>. Dept. 2009]); where a painted sidewalk was slippery when wet from rain but prior to the rain the paint had thoroughly dried and was somewhat worn but there was no evidence the paint was in any way defective, or contained improper materials or had been improperly applied ( Phillips v. Mckinley Square Corporation, 285 A.D. 18, Supra); where plaintiff slipped on driveway apron wet from rain and there was no evidence that the apron was improperly constructed or designed ( Richardson v. Campanelli, 297 A.D. 2d 794, Supra).**

**The mere fact that the outdoor deck was wet from the rain is insufficient to establish the existence of a dangerous condition. This outdoor deck’s wetness coupled with the presence of leaves on it, on a rainy day, given the existence of a tree in the middle of the deck is a naturally recurring condition of these premises ( Sandowsky v. 2175 Wantagh Avenue Corp., 281 A.D.2d 407, 721 N.Y.S.2d 665 [2<sup>nd</sup>. Dept. 2001]; Todt v. Schroon River Campsite Inc., 281 A.D.2d 782, 722 N.Y.S.2d 287 [3<sup>rd</sup>. Dept. 2001]).**

**Defendants have made a prima facie case for judgment as a matter of law. Plaintiff has failed to show the existence of a defective or dangerous condition on the premises and that defendants either created or had knowledge of the condition. Plaintiff cannot definitively state what caused her to fall. Her attempts at raising an issue of fact by claiming that the deck may have been improperly cleaned thereby possibly causing a film of mold or algae to exist at the time of her accident, or that the failure to post a sign after a rainstorm possibly created a trap, are speculative and conclusory assertions insufficient to defeat this motion ( see Busterna v. Branch Office Associates, 253 A.D.2d 837, 678 N.Y.S.2d 366 [2<sup>nd</sup>. Dept. 1998]).**

**Plaintiff slipped and fell on the outdoor deck at defendants' premises after it had rained heavily. The accident did not occur as a result of a dangerous or defective condition on the outdoor deck. Plaintiff does not really know what caused her to fall. Under these circumstances liability cannot be imposed on the defendants, nor is an issue of fact raised precluding the granting of summary judgment.**


**Accordingly , it is ORDERED that defendants' motion for summary judgment is granted, and it is further**

**ORDERED, that defendants are granted summary judgment dismissing the complaint and the complaint as against all defendants is dismissed, and it is further**

**ORDERED, that the clerk is directed to enter judgment accordingly.**

**ENTER:**

**Dated: March 7, 2017**

**MANUEL J. MENDEZ**  
J.S.C.  
  
\_\_\_\_\_  
**Manuel J. Mendez**  
J.S.C.

**Check one:   X FINAL DISPOSITION           NON-FINAL DISPOSITION**  
**Check if appropriate:    DO NOT POST                            REFERENCE**