Govenar v Brushstroke
2017 NY Slip Op 31478(U)
July 12, 2017
Supreme Court, New York County
Docket Number: 160114/2013
Judge: Arlene P. Bluth

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

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JODY GOVENAR,

Plaintiff,

-against-

BRUSHSTROKE, BOJI D/B/A BRUSHSTROKE, BOULEY DUANE STREET D/B/A BOULEY RESTAURANT, ACTION CARTING ENVIRONMENTAL SERVICES, INC., ONE HUDSON PARK ASSOC LLC, ABBEVILLE PRESS INC, ONE HUDSON PARK INC, A&L CESSPOOL SERVICE CORP., SCIENTIFIC FIRE PREVENTION CO., NEW YORK NAUTICAL INSTRUMENT & SERVICE CORP., THE ANDREWS ORGANIZATION, INC.

Defendants.
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DECISION & ORDER
Index No. 160114/2013

Mot. Seq. 020

The motion by defendant One Hudson Park, Inc. (OHPI) for summary judgment is granted and all claims against it are severed and dismissed

Background

This action arises out of alleged injuries suffered by plaintiff on the sidewalk near 30 Hudson Street, New York, New York on July 28, 2013. Defendant Brushstroke operates a restaurant at 30 Hudson Street. Plaintiff contends that she slipped on an oily greasy substance on a Sunday morning. The parties dispute the origin of this alleged grease.

OHPI is the co-op located at the premises and claims that its sole employee at the building was not working on the day of the accident (which occurred on a Sunday). OHPI's building superintendent was on vacation during the accident and his temporary replacement was

not working on the day of plaintiff's accident. OHPI leased the ground floor commercial spaces to One Hudson Park Associates LLC, which then sublet the spaces to commercial tenants. The Andrews Organization served as OHPI's management company for the building.

OHPI insists that it did not have actual or constructive notice of the alleged dangerous condition nor was it aware of any information that might suggest that grease on the sidewalk was a recurring condition.

In opposition, plaintiff insists that OHPI, as owner of the property, has a non-delegable duty to ensure that the sidewalks abutting its property are safe. Plaintiff theorizes that because there was a significant amount of oil or grease on the sidewalk, it must have been there for weeks prior to the accident.

Defendant Action Carting also opposes the motion on the ground that there must be an issue of fact based on OHPI's failure to establish when it last inspected the area.

Background

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]).

After "the passage of § 7-210 of the Administrative Code of the City of New York, the duty to maintain and repair public sidewalks, within the City of the New York, and any liability for the failure to do so, was shifted, with certain exceptions, to owners whose property abuts the sidewalk" (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 560, 904 NYS2d 367 [1st Dept 2010]). "It is well settled that in order to hold an owner liable for a dangerous condition within a premises, it must be established that the owner created the dangerous condition alleged or failed to remedy the condition despite having prior actual or constructive notice of it" (*id.* at 560-61 [citations omitted]). "A defendant owner is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the occurrence of an accident to permit the defendant to discover and remedy the condition. The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law . . . [A] defendant may be charged with constructive notice of a hazardous condition if it is proven that the condition is one that recurs and about which the defendant has actual notice."

Here, there is no evidence before this Court that suggests that OHPI created the greasy condition, that it had actual knowledge of the condition, or that OHPI had actual notice of a recurring problem with grease on the sidewalk. Therefore, this Court must consider whether OHPI had constructive notice of the grease.

The testimony of defendant New York Nautical's James Smith establishes that the condition did not exist long enough for OHPI to be charged with constructive notice of the grease. Mr. Smith, who operated a map store located right next to Brushstroke's restaurant, testified that although he did not have a specific recollection of the day of the accident, he was working that day and that he did not notice any greasy conditions on the sidewalk in front of the Brushstroke restaurant in July 2013 (Smith tr at 17-21). Smith's store closed at one p.m. on Saturdays (*id.* at 17).

This testimony establishes that the greasy condition did not occur days or weeks prior to the accident. It occurred, at the earliest, some time on Saturday afternoon– the day before plaintiff's accident. Plaintiff provided no evidence, other than mere supposition, to contradict Mr. Smith's testimony. A dangerous condition originating the afternoon before the accident is not enough time for OHPI to have discovered and remedied the issue because OHPI's employee did not work on Saturday afternoons or on Sundays (*see Pagan v New York City Hous. Auth.*, 121 AD3d 622, 623, 996 NYS2d 10 [1st Dept 2014]). The building super, Mr. Rodriguez, testified that his shift is Monday to Friday (8 a.m. to 4 p.m.) and Saturday mornings (from 8 a.m. to 11:30 a.m.) and that he does not work on Sundays (Rodriguez tr at 73). Mr. Rodriguez swore that he was on vacation when the accident occurred (Mr. Rodriguez returned to work on Monday, July 29, 2013) and that his substitute was scheduled to work the same hours that Mr. Rodriguez

worked (*id.* at 72). Although a landlord has a duty to maintain reasonably safe sidewalks, OHPI was not required to patrol the sidewalk abutting its property 24 hours a day (*Pagan*, 121 AD3d at 623).

Accordingly, it is hereby

ORDERED that OPHI's motion for summary judgment is granted and all claims against OHPI are severed and dismissed and the clerk is directed to enter judgment accordingly.

This is the Decision and Order of the Court.

Dated: July 12, 2017
New York, New York

ARLENE P. BLUTH, JSC