

Berry v Rosa Mexicano USQ, LLC

2011 NY Slip Op 32823(U)

October 13, 2011

Supreme Court, New York County

Docket Number: 103437/09

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ABIGAIL BERRY,
Plaintiff,

Index No.: 103437/09

Motion Date: 6/28/11

- v -

Motion Seq. No.: 02

ROSA MEXICANO USQ, LLC ROSA MEXICANO and RM
HOSPITALITY GROUP,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____

FILED

Cross-Motion: Yes No

OCT 18 2011

Upon the foregoing papers,

NEW YORK
COUNTY CLERK'S OFFICE

Defendants move for summary judgment on the complaint in this slip and fall action. Plaintiff cross-moves for an order permitting an engineer's inspection.

The accident occurred on December 22, 2007, in the late afternoon/early evening at the premises owned by defendants, located at 61 Columbus Avenue, New York, New York. The complaint that the defendants were negligent in failing to maintain a safe premises.

Plaintiff states that she was having a meal with her friends

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

and decided to use the restroom. In order to reach the restroom, she had to walk up a staircase. Upon ascending the staircase, she claimed to have noticed a type of water fountain on the wall to her right. Though she does not claim to have noticed any moisture on the stairs, she apparently slipped on the stairs about a third of the way upstairs. As her right foot slipped out from underneath her, she attempted to hold the handrail in order to break her fall. She averred that the handrail was slippery and she eventually fell down on all her limbs.

Plaintiff testified that she did not know how many steps she fell down but that the steps had no slip resistant material. She did not recall seeing any moisture on the steps but mentioned there was moisture on her pants, specifically her knee region. She stated that she was not aware of the identity of the wet substance on her knee.

Defendants move for summary judgment submitting plaintiff's deposition testimony and photographs of the staircase which were identified by plaintiff. They also submit deposition testimony from Carlos Montoya, a General Manager of defendant Rosa Mexicano. He testified that there had been no complaints or comments concerning the condition of the staircase prior to the accident. He did not see plaintiff on the day of the accident and was not aware of her fall. He states that the premises contained a water fountain called a water wall, and that on

occasion there were inspections of that area in order to prevent spraying.

Defendants seek summary dismissal of the complaint on the grounds that plaintiff has failed to submit any evidence tending to show that they created a defective condition on the premises that caused plaintiff's accident or that they had actual or constructive notice any defective condition prior to the accident. Defendants argue that plaintiff's claim that there was moisture on the stairs that led to her fall is speculative. They contend that plaintiff was unable to identify any moisture on the staircase prior to the fall or connect the moisture to the nearby water wall. Defendants aver that since plaintiff is unable to establish that they had timely notice of the alleged condition plaintiff is unable to sustain a claim of liability.

Plaintiff cross-moves for an order permitting an engineer's inspection of the premises. Plaintiff's counsel, following the deposition of defendants' employee, served on defendants a Demand for Discovery and Inspection and defendants have failed to comply. Counsel states that the parties sought to schedule the inspection but suspended reaching any agreement due to discussions considering a possible mediation. Plaintiff seeks an expert examination of the staircase despite having filed a note of issue, and argues that defendant is not prejudiced.

Plaintiff contends that there is an issue of fact as to whether the water wall created a slippery condition on the steps. Since defendants have stated that inspections of the particular area were done on a regular basis, plaintiff argues that they should have had notice of a wet condition. Plaintiff claims that her evidence is sufficient to establish that defendants had either actual or constructive notice. Plaintiff submits an affidavit from a Shalimar Kelly (Kelly), who claims to have been with her at the time of the accident, and to have witnessed the accident. Kelly identifies water existing on the stairs prior to the accident.

In reply, defendants argue that the proof alleged by plaintiff is insufficient to preclude summary judgment. They state that the affidavit from Kelly, who was a previously undisclosed witness, is improper and lacks probative value because it contradicts plaintiff's earlier testimony and attempts to avoid the consequences of that testimony.

In opposition to the cross-motion, defendants argue that as it was brought after the note of issue was filed, such application is a fishing expedition. They also dispute that plaintiff has provided a reasonable excuse for their belated application to inspect the premises.

In order for a defendant to be held liable for a dangerous or defective condition, plaintiff must establish that defendant

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created or had actual or constructive notice of that condition. See Ross v Betty G. Reader Revocable Trust, 86 AD3d 419 (1st Dept 2011). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986).

The court finds that plaintiff has failed to demonstrate that defendants created a dangerous condition on the staircase. While there was a water feature near the staircase, there is no evidence of water on the stairs at or before the accident. The Kelly affidavit submitted in opposition to the motion shall be disregarded. The affidavit, which attested to an eyewitness account of the scene of the accident, directly contradicts plaintiff's deposition testimony and appears contrived, as if an attempt at overcoming weaker positions raised by plaintiff. As stated by the Court, this affidavit is "insufficient to defeat defendant's motion, as [it] contradict[s] plaintiff's deposition testimony and appear[s] to be tailored to avoid the consequences of her earlier testimony. Furthermore, the submission of the . . . affidavit, a previously undisclosed notice witness, for the first time in opposition to the motion for summary judgment is improper." Garcia v Good Home Realty, Inc., 67 AD3d 424, 425 (1st Dept 2009) (citations omitted).

In the absence of the creation of the dangerous condition, there must be some proof of notice, actual or constructive. Here, there is no proof of notice and no evidence that defendants had sufficient time, prior to the accident, to remedy the alleged condition.

With respect to the cross-motion, plaintiff has failed to explain why she waited so long to move for an engineer's inspection. The defendants' submissions indicate that plaintiff had, until very recently, no interest in demanding any inspection of the premises. Even though the parties did consider mediation, there is no sufficient proof that the mediation was seriously considered. Absent is any explanation of the relevance of an inspection to plaintiff's claims. Moreover, plaintiff does not reveal any unusual circumstances that may have recently moved her to demand such a procedure at this late state. See Miller v Metropolitan 810 7th Ave., 50 AD3d 474, (1st Dept 2008).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is GRANTED, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion for an order allowing an engineer's inspection is DENIED.

This is the decision and order of the court.

Dated: October 13, 2011

ENTER:

~~John J. Jones~~
J.S.C.

DEBRA A. JAMES

FILED

OCT 18 2011

NEW YORK
COUNTY CLERK'S OFFICE