Togut v Riverbay Corp.
2011 NY Slip Op 34072(U)
December 21, 2011
Supreme Court, Bronx County
Docket Number: 302596/08
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

--X

Albert Togut, as Chapter 7 Trustee for
Berthenia Singleton,

Plaintiff,

-against-

DECISION / ORDER
Index No. 302596/08

RIVERBAY CORPORATION,

Defendant.

--X

The following papers numbered 1 to 4 read on the below motions noticed on **August 23, 2011** and duly submitted on the Part IA15 Motion calendar of :

Papers Submitted	Numbered
Defs. Notice of Motion, Exhibits	1,2
Pl. Affirmation in Opposition, Exhibits	3,4

In an action seeking damages for personal injuries resulting from an alleged trip-and-fall accident, defendant Riverbay Corporation (hereinafter "Riverbay") moves post-trial for an Order dismissing the complaint of plaintiff Albert Togut, As Chapter 7 Trustee for Berthenia Singleton (hereinafter "Plaintiff") or setting aside the jury verdict and ordering a new trial pursuant to *CPLR* 4404(a).

I. Factual and Procedural History

On November 4, 2003, Plaintiff allegedly tripped and fell on a defect located on Defendant's property, on a bright and sunny day. As a result of the accident, she allegedly suffered a torn meniscus of the left knee. Plaintiff had suffered the same injury as a result of an accident some 8-10 years earlier. At trial, the jury considered photographs of the accident, Plaintiff's testimony, and the testimony of both parties' medical experts. After two and one-half weeks of trial, the jury deliberated for 30 minutes and returned a verdict for Plaintiff in the total amount of $425,000. Defendant now makes the instant motion. Plaintiff opposes.

II. Standard of Review

Under CPLR 4404(a),

> The court may set aside a jury verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

For a court to decide that a jury verdict is not supported by legally sufficient evidence, there must be no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial *see Cohen v. Hallmark Cards,* 45 N.Y.2d 493, 499 (1978); *Nicastro v. Park*, 113 A.D.2d 129, 132 (2nd Dept. 1985). Any defect in the plaintiff's case can be cured by the evidence presented on the defendants case in chief. *Id.* In determining whether a plaintiff's initial burden has been established, the Supreme Court is obliged to consider all of the evidence, including the proof adduced by the defendants which cures any defects in the plaintiff's case. *See Bopp v. New York Elec. Veh. Transp. Co.*, 177 N.Y. 33, 35 (1903). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 (1997)

III. Analysis

First, Defendant argues that the evidence failed to show that there was an actionable defect. Defendant asserts that, at trial, Plaintiff failed to demonstrate the depth, width, or length of the alleged defect. Defendant further argues that the alleged defect in this case was not dangerous or hazardous as a matter of law. Rather, it was "trivial" and did not constitute a "trap or snare", as required to attach landowner liability. *Spiegel v. Vanguard Construction and Development Co.*, 50 A.D.3d 387 (1st Dept. 2008). In support, Defendant attaches photographs of the accident location and defect. Defendant also attaches the transcript of Plaintiff's trial testimony, where she "failed to state the alleged depth, width, or length of the defect." Plaintiff

also testified that the accident occurred on a "bright, sunny day" and the alleged defect would have been "open and obvious to any one paying attention".

Defendant has not established as a matter of law that there is "no valid line of reasoning" or "permissible inference" which could have led rational persons to conclude that there was a hazardous condition in this case. While Defendant argues that the dimensions of the alleged defect were not established, there is no "minimum" actionable defect dimension. Rather, as stated by Defendant, the inquiry is whether the defect "had the characteristics of a trap or a snare" such as an "edge". *Spiegel, supra., Glickman v. City of New York*, 297 A.D.2d 220 (1st Dept. 2002). In this matter, Plaintiff testified that the alleged hazard was not a "gradual, shallow depression" but rather a "space" or "drop" where the courtyard and sidewalk met, and her foot got "caught". The photographs depicted a "raised edge" that could render the defect "non-trivial". *Glickman, supra.* The evidence established a question for the jury as to whether the height differential constituted a tripping hazard. Moreover, although there were no adverse lighting conditions at the time of the accident, the fact that it was in an area traveled by pedestrians who are generally expected to be looking ahead, instead of down at the flooring, rendered the alleged defect non-trivial. *George v. New York City Transit Authority*, 306 A.D.2d 160 (1st Dept. 2003).

Whether a condition is "open and obvious" is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law where the facts compel such a conclusion. *Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69 (1st Dept. 2004). Even visible hazards do not necessarily qualify as open and obvious. *Id.* The relevant inquiry is whether the condition "could not reasonably be overlooked by anyone in the area whose eyes were open." *Liriano v. Hobart Corp.*, 92 N.Y.2d 232 (1998). That is not the case in this matter. Here, even Defendant's own witness testified that he would have put a "cone" or a "warning sign" near the condition until a repair was done, in order to "make sure nobody gets hurt". The evidence presented at trial presented a question of fact for the jury to consider, and reasoanbly supported the jury's ultimate conclusions.

Second, Defendant argues that Plaintiff failed to prove that her left knee meniscus injury was from the subject accident and not from a prior accident where she also sustained a left knee

meniscus injury. Defendant states that "Plaintiff's medical expert testified that her meniscus injury was from the subject accident but failed to explain or even address the prior meniscus injury." Defendant, however, does not include a transcript of the medical expert's trial testimony. Accordingly, this branch of Defendants' motion is procedurally defective, as this Court cannot now make an informed decision on its merits. *McCarthy v. 390 Tower Assoc., LLC*, 9 Misc.3d 219 (Sup. Ct., N.Y. Cty, 2005).

Third, Defendant argues that the jury "rushed the deliberation" and therefore the verdict must be set aside, if not dismissed. Again, Defendant provides no transcripts substantiating any of the events which are detailed in its attorney affirmation. Defendant does not substantiate its claims that the jurors were "rushing" to come to verdict when they did so within thirty (30) minutes of being charged. Defendant cites no case law that establishes a minimum reasonable time a jury may consider evidence before rendering a verdict. It would be patently improper to set aside a jury verdict based on Defendant's unsubstantiated allegations herein.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion to dismiss or set aside the jury verdict pursuant to *CPLR* 4404(a) is hereby DENIED.

This constitutes the Decision and Order of this Court.

Dated: December 21, 2011

Hon. Mary Ann Brigantti-Hughes, J.S.C.