Coston v Kawasar Haque
2014 NY Slip Op 31037(U)
April 17, 2014
Sup Ct, New York County
Docket Number: 115163/2010
Judge: Louis B. York

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Coston
-v-
Kawasa Hague, et ano

INDEX NO. 115163/2010
MOTION DATE 11/20/13
MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

FILED
APR 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
APR 22 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 4/17/14

LOUIS B. YORK, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: IAS PART 2

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PATRICIA COSTON,

Plaintiff,

Index No. 115163/2010

-against-

KAWASAR HAQUE D/B/A/ NEIGHBORHOOD CONVENIENCE STORE, and SEYS GROUP,

Defendant.

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LOUIS B. YORK, J.:

Defendants Kawasar Haque D/B/A/ Neighborhood Convenience Store ("Haque") and Seys Group ("Seys") are moving for summary judgment and dismissal against the Plaintiff Patricia Coston ("Coston") in this slip and fall case. Plaintiff received back and neck injuries that required surgery. She contends that these injuries were due to a fall she suffered inside Haque's convenience store and argues that Haque was negligent. Plaintiff also sued Seys, alleging that as the landlord, Seys had control over the property and was negligent in not exercising their rights to inspect the property. Plaintiff points to

a provision in the contract between Haque and Seys that allows Seys to enter the premises.

The fall occurred on August 29, 2009 inside of 222 1st Avenue New York, NY and Plaintiff underwent surgery for the neck on November 17, 2010. The facts show that on August 29, 2009 there was a light misting rain falling as Plaintiff was out walking with her client. Plaintiff was working as a home health aide during this time and her current client was an elderly man who was approximately eighty years old. Part of her duties consisted of taking her client out for walks and on this particular day they went Defendant Haque's store to play the lottery. They had been to this store before and went there approximately once every week or once every other week. Plaintiff only went to this store when she was with this particular client. Plaintiff's client used a walker and brought it with him on this trip. During their walk, Plaintiff did not notice any puddles or floods on the roads or sidewalk.

They arrived at the store sometime in the afternoon while it was still misting outside. The rain was not heavy so neither the Plaintiff nor her client carried umbrellas or wore a raincoat, rain hat or jacket. Plaintiff was wearing flat-soled sneakers. Because of the wet weather, Defendant had placed three rubber mats from the entrance of the store that led into the middle of the store. While Plaintiff walked into the store, her client waited outside. After she entered, the client called her back out and indicated that he wanted to come in. As the client attempted to come inside, his walker started to slip and Plaintiff reached out to steady him. Thereafter, the client remained outside. Plaintiff continued into the store and began walking down a slight ramp when her feet began to slide. Plaintiff did not notice any wetness on the floor until after she started slipping.

After Plaintiff's fall, she laid on the floor for approximately fifteen minutes. The person working behind the counter asked if Plaintiff was alright and offered her an Advil, which she refused. Eventually a customer in the store helped her up and Plaintiff was later transported to the hospital via ambulance. Plaintiff did not complain to the worker about the condition of the floor and neither did any of the other customers on that day. Under New York law, to establish a prima facie claim of negligence against a property owner arising from a defective condition on the property, a plaintiff must show that the dangerous condition existed and that the owner either created the condition or that he had actual or constructive notice of it. Gluskin v. National R.R. Passenger Corp., 1994 U.S. Dist. LEXIS 8593 (S.D.N.Y. June 27, 1994); *see also* Tuthill v. United States, 270 F. Supp. 2d 395 (S.D.N.Y. 2003) *(citing* Voss v. D & C Parkway, 299 A.D.2d 346, 347, 749 N.Y.S.2d 76, 77 (2nd Dept. 2002).

Plaintiff claims that Defendant Haque created the condition when they hired contractors to even the floors during renovations. After the renovations, the floor was not completely even but mostly even. Plaintiff says that the fact that Defendant placed floor mats at the front of the store shows that Defendant knew that the front area was dangerous. Plaintiff also argues that the storm-in-progress doctrine does not apply to Defendant here because it is not applicable to rain storms and that liability should attach to Defendant anyway.

When a defendant moves for summary judgment and dismissal, the burden is on the defendant to "make a prima facie showing of entitlement to dismissal as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986). In

order to prevail on its current motion, Defendant must show that there was no dangerous condition, or that if there was a dangerous condition, they had no actual or constructive notice of it. Ceron v. Yeshiva University, 2013 N.Y. Misc. Lexis 4378 (Sup. Ct. N.Y. 2013).

Defendant did not create the dangerous condition that caused Plaintiff to fall. Instead, he had completed renovations in order to fix the slope of the floor and make it less dangerous. The placement of mats during rainy weather does not put Defendant on notice of a dangerous condition, rather it is a customary precaution to take during wet weather. "The mere fact that the ramp became wet from the rain is insufficient to establish the existence of a dangerous condition." Medina v. Sears, Roebuck Co., 41 A.D.3d 798, 799, 839 N.Y.S.2d 162, 163 (2nd Dept. 2007). This rule is not limited to ramps; the simple fact that a surface has become wet from rain is insufficient to establish the existence of a dangerous condition. McGuire v. 3901 Independence Owners, Inc., 74 A.D.3d 434, 435, 902 N.Y.S.2d 69. 70 (1st Dept. 2010). In a case where plaintiff fell on a wet staircase, the Second Department said that "the complaint properly was dismissed because, as a matter of law, mere wetness on walking surfaces due to rain does not constitute a dangerous condition" and that "the mere fact that the exposed staircase was wet from the rain is insufficient to establish a dangerous condition." Gomez v. David Minkin Residence Hous. Dev. Fund. Co., 85 A.D.3d 1112, 1113, 927 N.Y.S.2d 117, 118 (2nd Dept. 2011). Further, unevenness due to the existence of a ramp or a slope does not affect the "principle that, without more, the simple fact that a surface has become wet from rain is insufficient to establish the

existence of a dangerous condition" and that "this rule is not limited to ramps." Yeshiva, 2013 N.Y. Misc. Lexis 4378.

Defendant has established entitlement to summary judgment as a matter of law, by demonstrating that there was no dangerous condition in existence when plaintiff slipped and fell. Accordingly, the burden shifts to the Plaintiff.

> One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.

Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 598 (1980).

Plaintiff has not introduced any evidence which demonstrates an issue of material fact regarding the existence of a dangerous condition. Instead, Plaintiff argues that a sloped ramp of any degree can be a dangerous condition. Plaintiff has not shown that this particular ramp was dangerous. Without evidence, Plaintiff's contention that there was a dangerous condition without evidence is insufficient to raise a triable issue of fact. Prospect Hosp., 68 N.Y.2d at 324.

Plaintiff's argument that the storm-in-progress doctrine does not apply is correct. The doctrine does not apply to conditions caused by a storm where the only precipitation is rain, which is the case here. Hillman v. Sarwil Assocs., 13 A.D.3d 692, 693, 786 N.Y.S.2d 225, 226 (3rd Dept. 2010). The storm-in-progress doctrine allows for a store owner to suspend his obligations to take reasonable steps to ameliorate the condition during a storm. Assaf v. City of New York, 28 Misc. 3d 1233(A) (N.Y. Sup. Ct.

2010). However, even if the storm-in-progress doctrine doesn't apply here and Defendants obligation to ameliorate the condition was not suspended, Defendants did not create a dangerous condition. Summary judgment is still satisfied here where Plaintiff has failed to show evidence demonstrating an issue of material fact regarding the existence of a dangerous condition.

Accordingly, Defendant's motion for summary judgment is granted for the above reasons.

ORDERED that defendant's 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.

Dated: 4/17/14

FILED
APR 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

LOUIS B. YORK
J.S.C. J.S.C.