Stubbolo v Park Place on Broadway, Ltd.
2014 NY Slip Op 33373(U)
December 16, 2014
Supreme Court, Suffolk County
Docket Number: 11-19004
Judge: Jeffrey Arlen Spinner
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[* 1]

SHORT FORM ORDER

INDEX No. 11-19004
CAL. No. 13-01859OT

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 4-2-14
ADJ. DATE 6-18-14
Mot. Seq. # 001 - MD

JEREMIAH F. STUBBOLO,	:	MICHAEL G. LoRUSSO, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	316 Jackson Avenue
	:	Syosset, New York 11791
- against -	:	
	:	BELLO & LARKIN
PARK PLACE ON BROADWAY, LTD.,	:	Attorney for Defendant
	:	150 Motor Parkway, Suite 405
Defendant.	:	Hauppauge, New York 11788

Upon the following papers numbered 1 to 14 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 10 -12 ; Replying Affidavits and supporting papers 13 - 14 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Park Place on Broadway, Ltd. seeking summary judgment dismissing the complaint is denied.

Plaintiff Jeremiah Stubbolo commenced this action to recover damages for injuries he allegedly sustained as a result of a slip and fall that occurred on the premises known as Broadway Self Storage, located at 280 Broadway in the Town of Huntington on March 14, 2009. The subject premises are owned by defendant Park Place on Broadway, Ltd. It is alleged that plaintiff, whose sister rented a storage unit at the subject premises, slipped and fell when the flatbed cart that he was standing on rolled away after he jumped up to reach a rope hanging from the bottom of the sliding garage door of the storage facility.

Defendant now moves for summary judgment on the basis that plaintiff is unable to establish a prima facie case of negligence against it, because it did not create or have actual or constructive notice of the alleged defective condition on its premises which allegedly resulted in plaintiff's injuries. Defendant further asserts that plaintiff's action of jumping up to reach the rope while standing on a cart was the sole proximate cause of the accident. In support of the motion, defendant submits copies of the pleadings and

the parties' deposition transcripts. Plaintiff opposes the motion on the basis that there are triable issues of fact as to whether defendant had notice of the defective condition on its premises. In opposition to the motion, plaintiff submits his own affidavit.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is well established that the "mere happening of an accident does not constitute negligence" (***Gonzalez v City of New York***, 148 AD2d 668, 670, 539 NYS2d 418 [2d Dept 1989]). To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injury (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Kievman v Philip***, 84 AD3d 1031, 924 NYS2d 112 [2d Dept 2011]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]). Moreover, a property owner has a duty to maintain his or her premises in a reasonably safe condition (*see* ***Kellman v 45 Tiemann Assocs.***, 87 NY2d 871, 872, 638 NYS2d o937 [1995]; ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 563 [1976]; ***Kruger v Donzelli Realty Corp.***, 111 AD3d 897, 975 NYS2d 689 [2d Dept 2013]), but does not have a duty to protect or warn against open and obvious conditions that are not inherently dangerous (*see* ***Russo v Incorporated Vil. of Atl. Beach***, 119 AD3d 764, 989 NYS2d 320 [2d Dept 2014]; ***Brande v City of White Plains***, 107 AD3d 926, 966 NYS2d 911 [2d Dept 2013]). Therefore, to impose liability on a landowner as a result of an allegedly defective condition on the property, a plaintiff must show that his or her injuries are the result of a defective condition that the defendant either created or had actual or constructive notice of its existence (*see* ***Semros v Gruppuso***, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]; ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]). A general awareness of that a dangerous condition might exist on one's premises is legally insufficient to charge a defendant with constructive notice of such condition (*see* ***Gordon v American Museum of Natural History***, *supra*; ***Joseph v New York City Tr. Auth.***, 66 AD3d 842, 888 NYS2d 533 [2d Dept 2009]; ***DeJesus v New York City Hous. Auth.***, 53 AD3d 410, 861

NYS2d 31 [2d Dept 2008]; ***Seabury v County of Dutchess***, 38 AD3d 752, 832 NYS2d 269 [2007]). Liability can be predicated only on a failure of the defendant to remedy the danger after receiving actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]; ***Mormile v Jamestown Mgt. Corp.***, 71 AD3d 748, 897 NYS2d 169 [2d Dept 2010]).

Plaintiff testified at an examination before trial that his sister, Nancy Stubbolo, rented a storage unit at Broadway Self Storage, which was located on the second floor of the storage facility, and that he and his sister had been to the facility on numerous occasions. Plaintiff testified that on the day of his accident, the facility's main office was closed, that he was accompanied to the facility by his sister and 13-year-old niece, and that they accessed the storage facility via the side door, which led to the receiving floor and elevator, because they had several large boxes to place in their storage unit. He testified that his niece opened the sliding door by pushing it up, that the door rolled all the way open, approximately seven to eight feet from the ground, and that it was prevented from rolling back towards the ground by a piece of metal. He testified that attached to the middle of the door was a rope or bungee cord and that he attempted to jump up to grab it, but it "snapped back" and he was unable to reach it or the handle located in the middle of inside of the door. Plaintiff testified that the facility kept a flatbed cart, approximately 2½ to 3 feet wide, in the hallway for use by its customers bringing furniture and other items into their storage units, and that his niece held the cart's handle while he stood on it to try to retrieve the rope to close the door. He testified that he still was unable to reach the rope, which was wrapped around the metal handle, while standing on the cart. Plaintiff testified that he jumped up to grab the rope, but the rope "snapped back," and that, as a result of the rope "snapping back," his body "jerked" forward, pushing the cart backwards, causing his niece to release the cart, and he fell to the ground. He testified that prior to the arrival of Burt, an employee at the facility, he did not believe that any employees were on the premises since the facility was closed. Plaintiff further testified that his sister did not receive any instructions as to what to do if a door at the facility became "stuck" when she rented the unit, that his sister had previously informed "Linda," another employee at the facility, about the sliding door "getting stuck," and that the last time the door opened all the way he was able to close it because the rope attached to the door was longer and not a bungee cord.

Burton Rosen, appearing on behalf of defendant, testified at an examination before trial that he is an employee at Broadway Self Storage, that he only works on Saturdays, that his supervisor is Linda Collins, and that there are approximately 300 storage units in the facility. Rosen testified that Nancy Stubbolo has a month-to-month lease for the storage unit, that the unit is located inside the building on the second floor, and that she was required to place her own lock on the unit. Rosen testified that the facility does not employ a maintenance team to make repairs inside the building, but uses handymen to make any needed repairs. Rosen testified that to access the receiving floor of the facility where plaintiff's accident occurred, a customer first comes through an entrance gate, which requires a code, drives around the left side of the building to the receiving area where there is a small door that requires a code, and then opens the sliding door, which is on a track, rolls up towards the back of the unit and has a rope attached to it to pull it closed. He testified that the sliding door has become "stuck on a couple of occasions," and that to close the door on such occasions, he uses a ladder and "shimmies" the door down to expose the attached rope to pull the door closed. He testified that there only is one ladder on the premises, that it is not accessible to the customers, and that there is a green moving dolly located on the receiving floor of the facility for the customers to use to transport furniture and other items into their

storage units. Rosen testified that he was in the office doing paperwork when he observed on the surveillance camera plaintiff fall from the cart, and that he immediately went to the receiving floor to see if plaintiff was alright. He further testified that when a customer is unable to pull the door down the customer should leave the door open, if the facility is closed, or report it to an employee by buzzing the front office or coming to the main office. He testified that Nancy Stubbolo did not receive instructions on "what to do if the door was stuck" when she signed the lease, but that he "walked her through the opening and closing of the sliding door." Lastly, Rosen testified that he does not know whether records of complaints about the sliding door are kept on file, but that "notes" only are kept for a few days.

Based upon the adduced evidence, defendant failed to establish its prima facie entitlement to judgment as a matter of law that it did not have notice of the defective condition in existence at its storage facility at the time of plaintiff's accident (*see* ***Karathanasis v Eastchester Union Free School Dist.***, 119 AD3d 904, 989 NYS2d 877 [2d Dept 2014]; ***Acevedo v New York City Tr. Auth.***, 97 AD3d 515, 947 NYS2d 599 [2d Dept 2012]; ***Baratta v Eden Roc NY, LLC***, 95 AD3d 802, 943 NYS2d 230 [2d Dept 2012]). Plaintiff and Rosen each testified that complaints had previously been made regarding the sliding door becoming "stuck," and that defendant's employees were aware of the problems with the door. Although Rosen testified that customers were to leave the door open or report it to an employee if they were unable to close it, he also testified that those instructions were not given to Nancy Stubbolo, the lessee of the unit, when she signed her lease. Consequently, the evidence submitted by defendant raises triable issues of fact as to whether it had notice of the problems with the sliding door located on its receiving floor, which was used by its customers to access the storage facility whenever large bulk items were being placed into their storage units. In addition, the evidence submitted by defendant failed to establish that plaintiff's actions were the sole proximate cause of the subject accident (*see* ***Harris v 11 W. 42 Realty Invs., LLC***, 98 AD3d 1084, 951 NYS2d 203 [2d Dept 2012]).

Furthermore, defendant failed to establish as a matter of law that plaintiff's actions were a superseding cause absolving them from liability (*see* ***Gomez v Hicks***, 33 AD3d 856, 824 NYS2d 312 [2d Dept 2006]; ***Dumbadze v Chwatt***, 7 AD3d 563, 889 [2d Dept 2004]). "It is well established that a plaintiff's actions that are extraordinary and unforeseeable will be deemed a superseding cause which severs the causal connection between the defendant's negligence and the plaintiff's injuries" (***Kriz v Schum***, 75 NY2d 25, 36, 550 NYS2d 584 [1989]; ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]). Whether a plaintiff's act is a superseding cause or a normal consequence of the situation created by a defendant are typically questions to be determined by the trier of fact (*see* ***Lynch v Bay Ridge Obstetrical & Gynecological Assoc.***, 72 NY2d 623, 536 NYS2d 11 [1988]). Here, the plaintiff's explanation of the accident's occurrence in his deposition testimony cannot be considered an extraordinary sequence of events that would lead to the conclusion, as a matter of law, that the risk of injury was unforeseeable (*see* ***Mazzio v Highland Homeowners Assn. & Condos***, 63 AD3d 1015, 883 NYS2d 59 [2d Dept 2009]; *cf.* ***Davidson v Miele Sanitation Co. NY, Inc.***, 9 AD3d 346, 780 NYS2d [2d Dept 2004]). As a result, triable issues of fact have been raised as to whether it was foreseeable that plaintiff would attempt to use the cart left in the open by defendant for its customers as a means to reach the rope attached to the door to close it if it became "stuck," a condition which defendant had prior notice of (*see* ***Gurmendi v Perry St. Dev. Corp.***, 93 AD3d 635, 939 NYS2d 549 [2d Dept 2012]; ***Spathos v Gramatan Mgmt.***, 2 AD3d 833, 770 NYS2d 130 [2d Dept 2003]).

Since defendant failed to meet its prima facie burden, the burden never shifted to plaintiff to submit evidence sufficient to raise a triable issue of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NYS2d 851, 487 NYS2d 316 [1985]). Accordingly, defendant's motion for summary judgment is denied.

Dated: DEC 16 2014

J.S.C.
HON. JEFFREY ARLEN SPINNER

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**