Parker v Board of Governors
2015 NY Slip Op 32036(U)
July 30, 2015
Supreme Court, New York County
Docket Number: 100463/12
Judge: Paul Wooten
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EA 8/4/15 IE

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

PRESENT: HON. PAUL WOOTEN Justice PART 7

RICHARD PARKER,

Plaintiff,

-against-

BOARD OF GOVERNORS AND MANAGERS OF THE GOLDEN WHEEL CONDOMINIUM, GOLDEN WHEEL CONDOMINIUM, AG/WOO CENTRE STREET OWNER LLC, CENTER 139 LLC, BUY RITE PHARMACY INC.,

Defendants.

INDEX NO. 100463/12

MOTION SEQ. NO. 001

BUY RITE PHARMACY INC. AND CENTRE STREET PHARMACEUTICAL, LLC,

Third-Party Plaintiffs,

-against-

MP DESIGN AND BUILTS, INC., ONESS DESIGN AND CONSULTING INC., KANG WING CHAN P.E., MINGANG PARTNERS and UD GENERAL CONTRACTOR, INC.,

Third-Party Defendants.

The following papers were read on this motion by defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

Motion sequence numbers 001 and 002 are consolidated for purposes of disposition.

Richard Parker (plaintiff) brings this personal injury action against defendants Board of Governors and Managers of the Golden Wheel Condominium, Golden Wheel Condominium,

Center 139 LLC (collectively, Golden Wheel), AG/Woo Centre Street Owner, LLC (AG/Woo), and Buy Rite Pharmacy (Buy Rite) alleging that on October 4, 2011, plaintiff was caused to trip and fall onto the sidewalk as he was exiting Buy Rite located at 99 Lafayette Street, New York, NY (the premises). Plaintiff alleges that the subject front step was a dangerous condition as a result of negligence in the improper management, ownership, operation, maintenance, and control of the premises.

In Motion Sequence 001, AG/Woo moves, pursuant to CPLR 3212, for an order dismissing all cross-claims against it, and for summary judgment dismissing plaintiff's complaint. Buy Rite cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims asserted against it.

In Motion Sequence 002, Golden Wheel moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against them. Third-party defendant MP Design and Builts, Inc. (MP Design), cross-moves, pursuant to CPLR 3211 and 3212, for an order dismissing the action, and for summary judgment dismissing the complaint and all cross-claims against it.

BACKGROUND

Plaintiff alleges that, on October 4, 2011, at approximately 2:30 p.m., he was caused to trip and fall on an exterior step platform while exiting on the Lafayette Street side of the Buy Rite Pharmacy (*see* Plaintiff EBT at p.17, lines 15-19; p.23 lines 19-21). Prior to the accident, plaintiff maintains that he did not enter Buy Rite through the same doorway, but entered through the Centre Street side of the premises (*see* Plaintiff EBT at p.17, lines 20-22; p.18, lines 2-13). Plaintiff testified that he came out of the doorway, took two steps forward then turned towards the north direction facing Canal Street, and then took another two or three steps towards the north end of the step platform (*see* Plaintiff EBT at p.26, lines 3-17). At this point, plaintiff was looking straight ahead, facing the north direction towards Canal Street (*see* Plaintiff

EBT at p.26, lines 18-24). Plaintiff maintains that the accident occurred on the edge of the step platform, and plaintiff testified that after slipping with his left foot, he took one step forward with his right foot and landed on his right knee on the sidewalk pavement (*see* Plaintiff EBT at pp.32-33, lines 21-3; p.37, lines 7-18). Plaintiff testified that as he was falling, he tried to balance himself or hold onto something to break his fall (*see* Plaintiff EBT at p.77, lines 3-9). After plaintiff fell to the ground, he used his cell phone to call a co-worker who then called EMS for plaintiff (*see* Plaintiff EBT at p.39, lines 9-19; p.40, lines 22-23).

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980], *DeRosa v City of NY*, 30 AD3d 323, 325 [1st Dept 2006].

When deciding a summary judgment motion, the Court's role is to solely determine whether any triable issues exist – not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978], *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

It is well established that when a defendant moves for summary judgment in a trip-and-fall case, the defendant "has the burden in the first instance to establish, as a matter of law, that it either did not create the alleged hazardous condition, or that it did not have actual or constructive notice of the condition" (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [defect in plaintiff's case was not inability to prove cause of his fall, but lack of evidence establishing constructive notice of the particular condition]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]).

Defendants in the current action move for summary judgment dismissing the complaint, arguing that plaintiff could not state what caused him to fall, and that the step did not constitute a trap, nor was it inherently dangerous because it was readily observable by one's reasonable use of his or her senses. Defendants have met their initial burden demonstrating that they neither created the purportedly dangerous condition that caused plaintiff to trip and fall, nor did they have actual or constructive notice of its existence. "To impose liability upon a defendant in

a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629 [2d Dept 2009]; *Larsen v Congregation B'Nai Jeshurun of Staten Is.*, 29 AD3d 643 [2d Dept 2006]). To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*Mitchell*, 29 AD3d at 374; *see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). Defendants demonstrated that the step is clearly visible as the black stone of the step directly contrasts with the light grey sidewalk, the step does not have any visible defects, and the step was not covered in any debris or liquid at the time of the accident. The Court finds that this evidence is sufficient to establish, prima facie, defendants' entitlement to summary judgment as a matter of law (*see Mitchell*, 29 AD3d at 374 [defendants met initial burden by demonstrating that there was no visible or apparent hazardous condition they could have discovered or remedied]; *Nelson v Northern Boulevard Corp.*, 95 AD3d 851, 852 [2d Dept 2012] [defendant met initial burden by demonstrating that step was open and obvious because it was made of orange colored tile and stood in contrast to the black rug located on the floor below the step]; *Franchini v American Legion Post*, 107 AD3d 432, 432 [1st Dept 2013] [defendant established entitlement to judgment as a matter of law through photographic evidence that the single step was open and obvious and not inherently dangerous because it was a different color than the tiled floor]).

In opposition, plaintiff has failed to raise a triable issue of fact as to whether the step is inherently dangerous. Although property owners have a duty to maintain their property in a reasonably safe condition and warn of underlying hazards of which they are aware, a landowner's duty to warn does not extend to the plaintiff when the condition complained of is open, obvious, and not inherently dangerous as a matter of law (*Garrido v City of New* York, 9

AD3d 267, 268 [1st Dept 2004]; *see Burke v Canyon Rd. Res.*, 60 AD3d 558, 559 [1st Dept 2008] [holding that defendant established prima facie entitlement to summary judgment because step upon which plaintiff tripped was illuminated, there were no debris on the ground where plaintiff fell, defendant was not aware of any prior complaints, accidents, or code violations of the step, and plaintiff testified that he did not trip or slip on anything in particular]). A condition is open and obvious as a matter of law if it is one that could not be overlooked by any observer reasonably using his or her ordinary senses (*Burke*, 60 AD3d at 559). Plaintiff's testimony indicates that the step upon which plaintiff tripped was well lit and there was no substance or debris on the step that caused plaintiff's fall (*see* Plaintiff EBT at p.25 lines 12-13; p.34, lines 20-22). New York case law is clear that where a step is open and obvious and not inherently dangerous, the plaintiff's claim will fail as a matter of law (*see Franchini v American Legion Post*, 107 AD3d at 432; *Nelson v Northern Boulevard Corp.*, 95 AD3d at 852; *Gibbons v Lido & Point Lookout Fire Dist.*, 293 AD2d 646, 647 [2d Dept 2002]).

Moreover, the Court finds that plaintiff's inability to identify the cause of his fall proves fatal to his claim (*see Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006] [summary judgment granted to defendants because plaintiff and his girlfriend were unable to identify the cause of plaintiff's fall]; *Dennis v Lakhani*, 102 AD3d 651, 652 [2d Dept 2013] [affirming grant of summary judgment to defendants because plaintiff could not ascertain at the time of the accident why he fell, and did not see any defects, breaks, or problems with the stairs as he began to walk down]; *see also Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

The Court also finds that plaintiff fails to raise a triable issue of fact as to whether defendants created the dangerous or defective condition. Plaintiff alleges that the hazardous condition was the improperly installed single step platform located at the entranceway itself, and

that this single step platform created an unsafe trap because no warning cues were given. However, plaintiff's evidence provides nothing more than mere speculation as to the cause of the accident and offers nothing to indicate that defendant created the hazard. "Rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]). Plaintiff's expert testifies that the use of a single step in an entranceway comes upon a pedestrian as a dangerous and unexpected trap because it is out of the line of sight of anyone approaching the step (*see* aff of Stanley Fein, exhibit 3). Plaintiff's expert cites to NYC Building Construction Code Section 28-301.1, which requires that all buildings and all parts thereof and all other structures shall be maintained in a safe condition (*id.*). This Code depends on whether the owner of the premises had actual or constructive knowledge of a dangerous condition which it failed to correct, but "does not address specifics that define what would constitute a safe condition" (*Miki v 335 Madison Ave.*, LLC, 30 Misc 3d 1214[A], 2011 NY Slip Op 50065[U] * 6 [Sup Ct, NY County 2011] *affd* 93 AD3d 407 [1st Dept 2012] [holding that plaintiff's claim lacked merit because the statute only imposes a general duty on owners to maintain their premises, and did not specifically address alleged structural defect at issue]). Courts have held that where it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation (*see Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435 [2d Dept 2006]; *Califano v Maple Lanes*, 91 AD3d 896, 898 [2d Dept 2012]).

Furthermore, although plaintiff's expert cited building codes and accepted practice standards, plaintiff does not allege any specific violations of these codes, and therefore there is a lack of proximate cause between the expert's theories and the plaintiff's alleged injury.

"Although proximate cause can be established 'in the absence of direct evidence of causation [and] ... may be inferred from facts and circumstances underlying the injury,' [m]ere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action'" (*Manning*, 28 AD3d at 435, quoting *Oettinger v Amerada Hess Corp.*, 15 AD3d 638 [2d Dept 2005]; *see Castore* 77 AD3d at 599). An expert affidavit can raise questions as to common-law negligence, however plaintiff's evidence failed to establish an issue of fact as to whether the step was inherently dangerous or constituted a "hidden trap" (*Burke*, 60 AD3d at 559). When the plaintiff cannot identify the cause of his or her accident, the court rejects experts alleging code violations on steps because they cannot connect the violations to the plaintiff's fall (*see Reed*, 30 AD3d at 320 ["no reasonable inferences as to causation can be drawn from plaintiff's expert's opinion that the staircase violated several provisions of the New York City Administrative Code, creating an unsafe condition, in the absence of any evidence connecting the alleged violations to plaintiff's fall"]; *Califano,* 91 AD3d at 898). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted. In light of the above, all cross-claims are dismissed as to the moving defendants as well.

In support of its cross-motion, MP Design argues that Buy Rite cannot prove its prima facie case of negligence against it because MP Design did not have any involvement in the "ownership, operation, maintenance, or control" of the premises, and Buy Rite has failed to present any evidence of MP Design's wrongdoing. MP Design has met its prima facie burden of establishing its entitlement to summary judgment dismissing the third-party complaint against it. MP Design provides an affidavit of its President, which states that "at no time prior to and including the date of the accident," did MP Design do any work on the interior, undertake maintenance, repair, or modification of the exterior, hire retain or support anyone to repair the interior or exterior of the premises, nor has MP Design received any payments for work to be

performed at the premises (*see* MP Design's Amended Notice of Cross-Motion, exhibit I). In opposition, Buy Rite provides a "Project Agreement," which was a proposal of potential construction work that MP Design was to perform (*see* Buy Rite Affirmation in Opposition, exhibit A) and is insufficient to raise a triable issue of fact.

While Buy Rite argues in opposition that discovery has not been completed and that this motion is premature, it fails to set forth a reliable factual basis for that assertion such as to warrant denial of MP Design's motion (*see Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499, 500-501 [1st Dept 2011] ["plaintiff... will not be allowed to use pretrial discovery as a fishing expedition when [it] cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions"], quoting *Devore v Pfizer Inc.*, 58 AD3d 138, 144 [1st Dept 2008]; *Auerbach v Bennett*, 47 NY2d 619, 636 [1979] ["to speculate something might be caught on a fishing expedition provides no basis to postpone decision on the summary judgment motions under the authority of CPLR 3212[f]"]). Only the existence of a bona fide issue raised by evidentiary fact, and not based on conclusory or irrelevant allegations will suffice to defeat summary judgment (*IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 570 [1st Dept 2011] [plaintiff's claim was "speculative and based upon unwarranted inferential leaps"]). Buy Rite has failed to raise a triable issue of fact, and therefore summary judgment must be granted in favor of MP Design.

CONCLUSION

In light of the foregoing, it is

ORDERED that AG/Woo's motion for summary judgment (motion sequence no. 001) is granted and the complaint is dismissed as asserted against it with costs and disbursements to said defendant as taxed by the clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the cross-motion of defendant Buy Rite for summary judgment

(motion sequence no. 001) is granted and the complaint is dismissed as asserted against it with costs and disbursements to said defendant as taxed by the clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that Golden Wheel's motion for summary judgment (motion sequence no. 002) is granted and the complaint is dismissed as against these parties with costs and disbursements to said defendants as taxed by the clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the cross-motion of MP Design Inc., for summary judgment (motion sequence no. 002) is granted and the third-party complaint is dismissed as asserted against it with costs and disbursements to said defendant as taxed by the clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that any cross-claims asserted against the moving parties are hereby dismissed; and it is further,

ORDERED that counsel for AG/Woo is directed to serve a copy of this order with Notice of Entry upon all parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 7/30/15

Enter:

PAUL WOOTEN, J.S.C

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**