

Velazquez v World Cellphone, Corp.

2016 NY Slip Op 30446(U)

February 19, 2016

Supreme Court, Bronx County

Docket Number: 302620/2013

Judge: Fernando Tapia

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

DIANA VELAZQUEZ,

Plaintiff,

Index No.: 302620/2013

Hon. Fernando Tapia

v.

WORLD CELLPHONE, CORP., 236 NAPLES
TERRACE, LLC, JM REAL ESTATE
MANAGEMENT, INC., BOOST MOBILE,
LLC

Defendants.

ORDER

In this slip and fall personal injury action, Defendant, World Cellphone Corp., moves for summary judgment dismissing the complaint filed by plaintiff, Diana Velazquez, and dismissing all cross claims filed against it. Plaintiff opposes the motion for summary judgment made by World Cellphone. Co-defendants, 236 Naples Terrace, LLC and JM Real Estate Management, Inc. also seek summary judgment on the issues of liability and indemnification. There has been no appearance by co-defendant Boost Mobile, LLC.

Movant, World Cellphone, claims plaintiff failed to identify the cause of her fall and that this defendant is entitled to judgment as a matter of law. When reviewing a motion for summary judgment, the facts are to be viewed in the light most favorable to the nonmoving party (*Gurfein Bros., Inc. v. Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1998]). All reasonable inferences must be resolved in favor of the nonmovant (*Melman v. Montefiore*, 98 AD3d 107 [1st Dept 2012]). Plaintiff produced testimony demonstrating the manner in which she fell. The testimony

testimony identifies the location in which she fell and the conditions existing at the time. One of the conditions identified by the plaintiff which existed at the time was a strip of cardboard at the threshold or entrance of the establishment on the floor. Plaintiff identified the strip of cardboard and asserts that it was the cause of her accident. Again, viewing the facts in the most favorable light, it can easily be inferred, and plaintiff has adequately alleged, that the cardboard was the cause.

It is inaccurate to say that plaintiff completely failed to identify what caused her to trip. Admittedly, plaintiff expressed uncertainty regarding what the actual cause was, but that is not to say that plaintiff did not offer an explanation. Some uncertainty with regards to what caused the plaintiff to fall is not a fatal defect (*Yuk Ping Cheng Chan Young T. Lee & Son Realty Corp.*, 110 AD3d 637, 638 [1st Dept 2013]). Given the circumstances, her explanation provides the necessary nexus between the condition and the actual incident to establish causation (*Id.*) According to plaintiff's deposition, her foot got caught as she stepped into the premises and immediately upon falling she noticed a piece of cardboard protruding up from the doorway. Plaintiff also identified the cardboard in the photographs shown to her during her deposition and provided as exhibits in the moving papers. Additionally, the cardboard/condition may have been changed subsequent to the incident according to the deposition testimony cited by the plaintiff.

Summary judgment must also be denied as the question of whether the condition was open and obvious and not inherently dangerous is generally a question of fact better suited for a determination by a jury. A court should only make the determination when the facts compel such a conclusion (*Westbrook v. WR Activities-Cabrera Markets*, 5 AD3d 69, 72 [2004]). The issue is clearly in dispute and as such triable issues of fact remain.

Defendant while claiming that the defect was open and obvious, at the same time maintains that any height differential was trivial. These contraindications regarding the same condition complained of provide additional support for denying the motion for summary judgment. As stated above, it is not clear that the condition was open or obvious, but in any event, assuming *arguendo* that it was, this does not relieve the property owner of the duty to maintain the property in a reasonable and safe condition (*Id.* at 72-73).

As for the cross-claims remaining between the co-defendants for indemnification, summary judgment must be denied. Neither World Cellphone nor JM Real Estate Management have demonstrated the absence of triable issues of fact. The dispute between the codefendant's revolves around the interpretation of the lease agreement and, more specifically, as to whether this alleged condition, at or near the threshold of the premises, constitutes "an exterior, public area and structural aspect of the building" as alleged by World Cellphone or if it was a portion of the premises which the lessee would be responsible for as alleged by JM Real Estate. While JM Real Estate provides case law on point, the facts of the case are distinguishable. In the *Panigua* case relied on by JM Real Estate, the plaintiff alleged she tripped over the *door saddle* of the entrance. In this case, the plaintiff alleges that she may have tripped over the cardboard which seems to have been placed in front of the door saddle. Additionally, JM Real Estate argues that the tenant is responsible for repairs necessitated by its carelessness. Issues remain as to which party, if either of the two, bear any responsibility as to any particular repair and there is also the question of whether that responsibility may have shifted assuming either party undertook steps in maintaining the property. While it may have been answered in the depositions, it is not at all clear to this Court why the cardboard was placed where it was or who directed that it be placed

there. As issues of fact remain, summary judgment on the issue of indemnification is denied as to both co-defendants.

Defendant's motions for summary judgment on liability and indemnification are denied.

This constitutes the Decision & Order of the Court.



Dated: February 19, 2015
Bronx, NY

Hon. Fernando Tapia, JSC