Dale v City of New York
2016 NY Slip Op 31752(U)
September 19, 2016
Supreme Court, New York County
Docket Number: 157611/2012
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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Marlene Dale and Irven Dale,

Plaintiffs,

-against-

The City of New York, The New York City Economic Development Corporation and Shop Architects, P.C.,

Defendants.

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Index No. 157611/2012
Motion Seq: 006 and 007

DECISION/ORDER

HON. ARLENE P. BLUTH

Motion sequences numbers 006 and 007 are consolidated for disposition.

The motions for summary judgment dismissing plaintiff's complaint by The City of New York and the New York City Economic Development Corporation (the City defendants) and by Shop Architects, P.C. (Shop) are both denied.

This cases arises out of a personal injury allegedly incurred by plaintiff Marlene Dale on May 30, 2012 on the pedestrian walkway at Pier 15 at the East River Waterfront in lower Manhattan. Plaintiff claims that she tripped and fell from the upper level of the boardwalk to the lower level below as a result of defendants' failure to warn and/or delineate the drop between the levels. Plaintiff Irven Dale asserts only a derivative claim.

The City defendants assert that the complaint should be dismissed because the City defendants exercised a governmental function in designing and planning Pier 15 and, therefore, are entitled to immunity from liability for plaintiff's injuries. Additionally, the City defendants and Shop assert that the defect plaintiff claims caused her accident was open and obvious and not

inherently dangerous.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

EDC and Qualified Immunity

As an initial matter, the Court must consider whether EDC is entitled to qualified immunity. Plaintiff claims that EDC is not entitled to immunity because it is a not-for-profit corporation rather than a governmental entity.

The City defendants argue that EDC is entitled to qualified immunity because the Mayor of New York City appoints EDC's board members and it works closely with the City on many projects. The City defendants also argue that to deny EDC immunity would be tantamount to prioritizing EDC's corporate form over its substance.

Neither party provided caselaw to support their respective positions on this issue. Accordingly, the Court is unwilling to provide EDC with qualified immunity simply because it works closely with the City of New York. Further, "[i]t is undisputed that EDC is not a City agency" (*Hunts Point Term. Produce Co-op. Assn., Inc. v New York City Economic Dev. Corp.*, 36 AD3d 234, 236, 824 NYS2d 59 [1st Dept 2006]). To shield EDC from potential liability would be manifestly unfair to plaintiff, especially where the City defendants failed to provide conclusive evidence that EDC is entitled to qualified immunity.

Qualified Immunity

In support of their motion, the City defendants claim that because the City and EDC exercised a governmental function in designing and planning Pier 15, they are absolutely immune from liability for plaintiff's injuries (affirmation of City defendants' counsel, ¶5).

Pier 15 is part of the East River esplanade; it is owned by the City of New York Department of Small Business Services (Terri Bahr tr at 18 [exh J]). Pier 15 includes a lower level with pavilions, railing, seating and landscaping, and an upper level consisting of a wooden deck with seating and landscaping (*id.* at 27). Shop created the design for Pier 15 pursuant to a Consultant Contract it entered into with EDC in 2006 (*see* exh G). This included recommending wood for the pier and creating the height differential for the amphitheater-style seating (Bahr tr at 32, 34-36). EDC reviewed the designs but did not review them for code compliance (*id.* at 40).

Community Board 1, the local community board, approved Pier 15's design (*id.* at 45-46, 48-49). Next, the design was submitted to the New York City Design Commission for aesthetic review. Thereafter Shop developed the final design (*id.* at 48, 49, 51). EDC provided only aesthetic approval to Shop's drawings and specification for the project (*id.* at 82-83).

On at least one occasion, the design for the Pier was changed based on EDC recommendations; EDC was concerned that the wood planking was "so perfect" and that the materials were so similar that it wanted a way to differentiate the pier's upper level from the amphitheater seating (*id.* at 85-86). In response, Shop placed grooves on the edge of the upper level seating (*id.* at 87-88; exhs Q-U). EDC approved this design (*id.* at 88). Other ways to indicate the edge of the seating "were considered", but Shop, EDC and City Planning decided that the grooved demarcation was appropriate (*id.* at 91). Shop designed a peanut seating as an additional "safeguard" (*id.* at 120).

In further support of their motion, the City defendants submit the deposition testimony of Catherine Jones who was in charge of the East River Waterfront project for Shop; she was involved with the overall design for the project, including Pier 15. Shop had additional consultants working under them (Jones tr at 28 [Exh K]), including architects and engineers (*id.* at 30-31). The amphitheater concept and design for the upper level of Pier 15 was a collaborative effort between the Shop design team and the City team, which consisted of the Mayor's Office, City planning, EDC and the Department of Transportation (*id.* at 37-39). During the construction phase of Pier 15 there were discussions regarding installing a guard rail on the top level of the amphitheater seating (*id.* at 91-92) but there were no discussions regarding a rail during the design phase because a rail was not required for a drop of less than 30 inches (*id.* at

92). The final layout of the peanut seats was a collaborative effort between Shop, EDC and City Planning, and the code consultants confirmed that the arrangement complied with applicable codes (*id.* at 209-210).

In opposition, plaintiff asserts that the City and EDC failed to offer sufficient proof that the discussions that took place between the City design team regarding the design and placement of the safeguards constituted a reasoned study, inquiry or investigation that would qualify for discretionary immunity. Plaintiff cites to Ms. Bahr's testimony that "it was apparent" that the grooves provided insufficient protection to pedestrians walking through the space. Plaintiff further asserts that the various email exchanges are not sufficient proof that a public planning body considered and passed upon the same question of risk as would go to a jury.

Plaintiff cites to Ms. Bahr's testimony that she performed only aesthetic approval, not technical approval (Bahr tr at 83) and that EDC did not review whether the design drawings for the pier conformed to code (*id.* at 40). Pursuant to paragraph 1.4.2 of the Consulting Contract, Shop's performance would be judged by "standards typical of consultants in the same or similar practice areas in the New York City statistical area" (*see* exh G). Ms. Bahr testified that she had no understanding as to what standards were being referred, but that it was Shop's responsibility to make sure they complied with whatever standards were required (Bahr tr at 75). As provided in the City Charter, the 12 person design commission reviews and approves ay project that will be implemented on City property. This review is aesthetic, not technical (*id.* at 49). Ms. Bahr stated that EDC does not make any decisions and must do what the design commission tells it to do (*id.* at 83-84).

"To establish its entitlement to qualified immunity, a governmental body must show that

a public planning body considered and passed upon the same question of risk as would go to a jury in the case at issue" (*Leon v New York City Tr. Auth.*, 96 AD3d 554, 554, 947 NYS2d 33 [1st Dept 2012] [internal quotations and citation omitted]) "A mere informal review or internal policy will not suffice. The defendant must demonstrate that a study, inquiry or investigation into that question was conducted and reached the determination now relied upon" (*id.* at 555).

Based on the evidence submitted, this Court is unable to conclude that the City is entitled to qualified immunity which requires dismissal of the complaint. The City defendants have not provided evidence tending to show that they conducted a detailed study or investigation into safety considerations at Pier 15. Although they submit the deposition testimony of Terri Bahr, they did not submit memos or other documents detailing investigation such as the commission of a safety study or reports about the various options for safeguards at Pier 15. Without such evidence, the Court cannot conclude that there was a study, inquiry or investigation sufficient to establish the City's entitlement to qualified immunity.

The City defendants' citation to plaintiff's exhibit L is similarly insufficient. These emails regarding a potential guardrail constitute, at best, an informal review. There is no evidence of a reasoned analysis regarding the safety risk at Pier 15. Emails, standing alone, are not enough for this Court to grant the City qualified immunity.

Accordingly, the City and EDC (if it were eligible), are not entitled to qualified immunity.

Optical Confusion

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615

[1997] [internal quotations and citation omitted]). "Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*id.*). A court must examine "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time place and circumstance of the injury" (*id.* at 978).

In support of their motion, defendants claim that plaintiff was the proximate cause of her injuries because she testified that she was not paying attention to where she was going was, instead, looking at the Brooklyn Bridge. Defendants also claim that plaintiff had already walked past the very spot where she later fell and, therefore, plaintiff's complaint should be dismissed. Defendants contend that the alleged dangerous condition was open and obvious. Defendants also assert that plaintiff's optical confusion claim fails because there were tactile ridges at the edge of the top level, peanut style seating to provide a visual cue, and plaintiff allegedly admitted not looking down when she fell.

Shop also claims that it had no duty to the plaintiff and cannot be held liable in the instant action.

In opposition, plaintiff claims that Shop did owe a duty to plaintiff because Shop launched a force or instrument of harm when it negligently designed the condition that allegedly caused plaintiff to fall. Plaintiff further claims that the defendants had actual or constructive notice because they created the defective condition. Plaintiff asserts that the City owes a non-delegable duty to plaintiff as property owner of Pier 15. Plaintiff disputes the fact that the alleged dangerous condition was open and obvious because the conditions created an optical confusion –

an illusion of a flat surface that obscures a step.

The Court finds that plaintiff has raised issues of fact sufficient to defeat defendants' summary judgment motions. Although defendants claim that plaintiff testified that she was looking at the ships rather than in front of her, plaintiff's testimony actually evidences a different account of her alleged fall. Plaintiff testified that she "was looking in front of me" and was not distracted by anything at the time she fell (City defendants' exh I at 42). Although plaintiff did claim that she was looking toward the Brooklyn Bridge when she fell (*id.* at 39), that answer was in response to a question about *the direction she was looking* and not *where she was looking*. Because the Court is unable to rule as matter of law that plaintiff was not looking where she was going the Court must consider plaintiff's optical confusion claim.

"[F]inding a hazardous condition to be open and obvious is not fatal to a plaintiff's negligence claim, but rather is relevant to plaintiff's comparative fault, and hence summary judgment dismissal is not appropriate" (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92, 924 NYS2d 32 [1st Dept 2011] [finding an issue of fact sufficient to defeat a summary judgment motion and holding that plaintiff's theory of optical confusion was supported by the record]). "[E]ven visible hazards do not necessarily qualify as open and obvious because the nature or location of some hazards, while they are technically visible make them likely to be overlooked (*id.* [internal quotations and citations omitted]).

Plaintiff has raised an issue of fact regarding optical confusion. The photographs submitted raise an issue of fact because the construction of this allegedly dangerous hazard made it likely to be overlooked (*see* affirmation of plaintiff's counsel in opposition, exhs A-B). The

wood paneling in these photographs makes it difficult to discern where the edge of the amphitheater seating ended and where the step, with a two-foot drop, began. Of course, a jury might find that the installation of the peanut-style seating and the grooves should reduce the percentage of negligence attributable to defendants. However, defendants have not submitted evidence to establish that, as a matter of law, plaintiff was a proximate cause of her fall. The extent to which the height differential and the alleged optical confusion constituted a dangerous condition can only be resolved by the jury.

Because the negligence claim remains, the loss of consortium claim also remains. The claims against Shop are not dismissed because plaintiff raised an issue of fact asserting that Shop was part of the design team that created the allegedly dangerous condition and, therefore, launched an instrument of harm. To the extent that the City defendants' motion seeks summary judgment on their cross-claims for indemnity/contribution and Shop's motion seeks dismissal of these cross-claims, both requests for relief are denied because the Court is unable to establish as a matter of law that any defendant is free from negligence (*see Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999]).

Accordingly, it is hereby

ORDERED that defendants' motions for summary judgment are denied.

This is the Decision and Order of the Court.

Dated: September 19, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC

ARLENE P. BLUTH
J.S.C.