Morris v Saint Francis Cabrini R.C. Church
2016 NY Slip Op 32460(U)
December 14, 2016
Supreme Court, Suffolk County
Docket Number: 11-16919
Judge: Daniel Martin
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[* 1]

SHORT FORM ORDER

INDEX No. 11-16919
CAL No. 14-00337OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 7-15-14
ADJ. DATE 6-28-16
Mot. Seq. # 001 - MG; CASEDISP

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KYLE S. MORRIS, as Executor of the Estate of VIRGINIA JOY MORRIS, Decedent,

Plaintiff,

- against -

SAINT FRANCIS CABRINI ROMAN CATHOLIC CHURCH,

Defendant.

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Upon the following papers numbered 1 to 32 read on this motion ____; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 23 - 27 ; Replying Affidavits and supporting papers 27 - 32 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Saint Francis Cabrini RC Church for summary judgment in its favor is granted.

This is an action to recover damages for injuries allegedly sustained by Virginia Morris on October 24, 2009, at the Saint Francis Cabrini RC Church located at 134 Middle Country Road, Coram, New York. Kyle S. Morris, as Executor of the Estate of Virginia Morris, now suing on behalf of Morris following her death in 2014, claims that defendant was negligent in, among other things, maintaining the kneelers in the first row of pews in the "wing section" of the church.

According to Morris' testimony, the accident took place during Saturday evening mass in the first pew on the right side of the aisle on the "wing side" of the church that faces the side of the alter. She testified that as she stood up to receive Communion, the kneeler, which parishioners flip down to rest their knees on during kneeled prayer, moved from its stationary upward position and struck her left shin,

causing a laceration. The laceration caused bleeding, which required stitches, and eventually led to cellulitis, which required surgical skin grafting.

Defendant now moves for summary judgment in its favor on the issue of liability arguing that the kneeler was not defective and, if it was, it did not create the condition, or have actual or constructive notice of the condition. Defendant submits, in support, copies of the pleadings, the transcripts of the deposition testimony of Virginia Morris, Michael Ventre, Father Donald Baier, and Alice Fazio, the affidavit of Father Donald Baier, and unauthenticated photos. In opposition, plaintiff argues that defendant created the hazardous condition by failing to maintain, inspect, and repair the pew where Morris customarily sat during church service. Plaintiff submits, in opposition, the affidavits of James Freebody and Kim Morris Freebody, and unauthenticated photos.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). 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 must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function on a motion for summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, so 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 Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). This duty may be breached, and a landowner may be held liable, if a dangerous and defective condition is permitted to exist on the property and such a condition causes injuries (*see* ***Bluth v Bias Yaakov Academy for Girls***, 123 AD3d 866, 999 NYS2d 840 [2d Dept 2014]; ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; ***Ortega v Liberty Holdings, LLC***, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]). However, property owners are not insurers of the safety of people on the premises (*see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Mondo New Line, Inc. v Syosset Indus. Park, LLC***, 137 AD3d 822, 26 NYS3d 477 [2d Dept 2016], *citing* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 519, 429 NYS2d 606, 614 [1980]), and will not be held liable for injuries unless a plaintiff demonstrates that a dangerous condition existed on the property, and that the landowner either created the condition or had actual or constructive notice of same (*see* ***Zamor v Dirtbusters Laundromat, Inc.***, 138 AD3d 1114, 31 NYS3d 130 [2d Dept 2016]; ***Witkowski v Island Trees Pub. Lib.***, 125 AD3d 768, 4 NYS3d 65 [2d Dept

2015]; ***Hoffman v Mucci***, 124 AD3d 723, 2 NYS3d 531 [2d Dept 2015]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that it did not create the defective condition, or have actual or constructive notice of its existence for a sufficient length of time to discover and repair it (*see* ***Witkowski v Island Trees Pub. Lib.***, *supra*; ***Cassone v State of New York***, 85 AD3d 837, 925 NYS2d 197 [2d Dept 2011]; ***Fontana v R.H.C. Dev., LLC***, 69 AD3d 561, 892 NYS2d 504 [2d Dept 2010]; ***Lezama v 34-15 Parsons Blvd, LLC***, 16 AD3d 560, 792 NYS2d 123 [2d Dept 2005]). Although whether a dangerous or defective condition exists 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, summary judgment in favor of a defendant landowner is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Witkowski v Island Trees Pub. Lib.***, *supra*; ***Rant v Locust Val. High Sch.***, 123 AD3d 686, 997 NYS2d 695 [2d Dept 2014]; ***Lezama v 34-15 Parsons Blvd, LLC***, *supra*). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Toma v Rizkalla***, 138 AD3d 1103, 30 NYS3d 321 [2d Dept 2016]; ***Willis v Galileo Cortlandt, LLC***, 106 AD3d 730, 964 NYS2d 576 [2d Dept 2013]). Photographs may be used to establish that a defect is trivial and not actionable if they fairly and accurately represent the accident site *(see* ***Mazza v Our Lady of Perpetual Help Roman Catholic Church***, 134 AD3d 1073, 24 NYS3d 98 [2d Dept 2015]; ***Santacruz v Taco Bell of America, LLC***, 128 AD3d 793, 10 NYS3d 122 [2d Dept 2015]; ***Platkin v County of Nassau***, 121 AD3d 879, 994 NYS2d 636 [2d Dept 2014]; ***Deviva v Bourbon Street Fine Foods & Spirit***, 116 AD3d 654, 983 NYS2d 295 [2d Dept 2014]).

Defendant made a prima facie entitlement to summary judgment by demonstrating that the kneeler was not defective, and it neither created nor had actual or constructive notice of the allegedly defective kneeler (*see* ***Gordon v American Museum of Natural History***; *supra*; ***Peralta v Henriquez***, *supra*; ***Witkowski v Island Trees Pub. Lib.***, *supra*; ***Rant v Locust Val. High Sch.***, *supra*; ***Teplin v Bonwit Inn***, 64 AD3d 642, 881 NYS2d 897 [2d Dept 2009]; ***Lezama v 34-15 Parsons Blvd, LLC***, *supra*). Defendant's submission established that visual inspections of the kneeler were done twice per week, that it never received any complaints about the kneeler in issue, and that plaintiff and others sat in the pew that contained the kneeler many times before and after the accident without incident. Such was sufficient to show, prima facie, that the kneeler was not defective, and that even if it were, defendant had no actual or constructive notice for a sufficient enough time to correct it (*see* ***Hunter v Riverview Towers***, 5 AD3d 249, 773 NYS2d 290 [1st Dept 2004]; ***Aquila v Nathan's Famous***, 284 AD2d 287, 725 NYS2d 371 [2d Dept 2001]). Defendant sufficiently demonstrated that it regularly inspects the kneelers and that any known defect in a kneeler is brought to the attention of the maintenance worker or Father Donald Baier, and is repaired. Michael Ventre, the church's maintenance man at the time of Morris' accident, testified that he visually inspected the kneelers every Monday and Wednesday while vacuuming and mopping the tile floors under the pews and kneelers. In order to clean, Ventre often moved the kneelers from a downward position into an upward position wherein he would be able to observe damages or defects, which he would repair. While it was unclear whether Michael Ventre or a cleaning company cleaned the church in Octoboer 2009, Father Donald Baier testified that the church was cleaned every Monday and Friday, that any defects observed were to be reported to him, and that no reports were made to him about any defective kneeler on Friday, the day before the accident. Two days

after the accident, Michael Ventre, Father Donald Baier, and Alice Fazio, the church's business manager, inspected the kneeler where Morris was injured and found no defect. Morris testified that she never complained about the kneeler being defective or dangerous, nor, to her knowledge, had anyone else ever complained about it (*see* ***Fontana v R.H.C. Dev., LLC***, 69 AD3d 561, 892 NYS2d 504 [2d Dept 2010]; ***Lezama v 34-15 Parsons Blvd, LLC***, *supra*). The kneelers within the church were used several times per week for multiple mass services both before and after Morris' accident with no incidents, including by Morris who continued to sit where the accident took place when she returned to church following her injury (*see* ***Donnelly v St Agnes Cathedral Sch.***, 106 AD3d 773, 964 NYS2d 262 [2d Dept 2013]). Such deposition testimony demonstrated the absence of any defect and lack of notice, defendant's submissions established, prima facie, that the kneeler was not defective or hazardous (*see* ***Zamor v Dirtbusters Laundromat, Inc.***, *supra*; ***Witkowski v Island Trees Pub. Lib.***, *supra*; ***Hoffman v Mucci***, *supra*; ***Donnelly v St Agnes Cathedral Sch.***, 106 AD3d 773, 964 NYS2d 262 [2d Dept 2013]). Morris' testimony that, after the accident, an unknown person in the church said that "we've had trouble with that kneeler" does not preclude summary judgment because inadmissible hearsay, on its own, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*).

Plaintiff's submissions in opposition are insufficient to prove that a triable issue of fact exists as to whether the kneeler was defective, or whether defendant created or had actual or constructive notice of the defect (*see* ***Donnelly v St Agnes Cathedral Sch.***, 106 AD3d 773, 964 NYS2d 262 [2d Dept 2013]). Photographs may be used to prove that the defendant had constructive notice of an alleged defect shown in the picture if it was taken reasonably close to the time of the accident and there is testimony that the condition at the time of the accident was substantially as shown in the photograph (*see* ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]; ***Gennaro v Cord Meyer Development Co. & LLC***, 57 AD3d 725, 871 NYS2d 214 [2d Dept 2008]; ***Muniz v New York City Transit Authority***, 30 AD3d 388, 816 NYS2d 561 [2d Dept 2006]). The photographs submitted by plaintiff, in opposition, are insufficient to show a defect or notice of a defect because there is no testimony that the condition of the kneeler in the photograph was substantially the same as its condition on the date of the accident and there is no indication as to when the photographs were taken (*see* ***Deviva v Bourbon Street Fine Foods & Spirit***, *supra*; ***Lustenring v 98-11 Realty, LLC***, 1 AD3d 574, 768 NYS2d 20 [2d Dept 2003]). However, were the Court to consider the photographs, there is no discernable defect in the photographs (*see* ***Hutchinson v Sheridan Hill House Corp.***, 110 AD3d 552, 973 NYS2d 178 [1st Dept 2013], *affd* 26 NY3d 66, 19 NYS3d 802 [2015]).

Affidavits presented in opposition to summary judgment may establish a triable issue of fact, unless they are tailored to raise a feigned factual issue in order to avoid the consequences of the plaintiff's earlier admissions (***Israel v Fairharbor Owners, Inc.***, 20 AD3d 392, 798 NYS2d 139 [2d Dept 2005]; *see* ***Ackerman v Iskhakov***, 139 AD3d 987, 30 NYS3d 850 [2d Dept 2016]; ***Blochl v RT Long Is. Franchise, LLC***, 70 AD3d 993, 895 NYS2d 511 [2d Dept 2010]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017, 884 NYS2d 866 [2d Dept 2009]). In his affidavit submitted by plaintiff, James Freebody, Morris' son-in-law, stated that the kneeler fell when Morris pulled on the pew in front of her in order to help her stand. Not only was Freebody not a witness to the accident, but these statements are inconsistent with Morris' deposition testimony that she "got up and the kneeler...fell on [her] leg," and merely raise feigned issues of fact unsupported by Morris' own description of the surrounding circumstances (*see* ***Denicola v Costello***, 44 AD3d 990, 844 NYS2d 438 [2d Dept 2007];

Tejada v Jonas, 17 AD3d 448, 792 NYS2d 605 [2d Dept 2005]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]). Plaintiff also submits an affirmation of his attorney alleging that Morris was injured when she pulled on the back of the pew in front of her to stand when the kneeler fell on its own accord and argues that defendant was negligent in not inspecting the pew in addition to the kneeler. The affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Service v McCoy***, 131 AD3d 1038, 16 NYS2d 283 [2d Dept 2015]). As it is just as likely that the accident was caused by some other factor, such as Morris knocking the kneeler down when trying to stand, any determination as to defendant's negligence would be based on speculation (*see* ***Deputron v A & J Tours, Inc.***, 106 AD3d 944, 964 NYS2d 670 [2d Dept 2013]; ***Dennis v Lakhani***, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013]; ***Califano v Maple Lanes***, 91 AD3d 896, 938 NYS2d 140 [2d Dept 2012]).

Accordingly, defendant's motion for summary judgment in its favor is granted.

Dated: DECEMBER 14, 2016

A.J.S.C.

__X__ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**