

Giambra v City of New York

2017 NY Slip Op 31829(U)

July 18, 2017

Supreme Court, Queens County

Docket Number: 14016/14

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 6
Justice

SALVATRICE GIAMBRA,

Plaintiff,

-against-

CITY OF NEW YORK, et al.,

Defendants.

Index No. 14016/14

Motion
Date May 31, 2017

Motion
Cal. No. 66, 67, 68

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Seq. No. 5, 7, 6

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FILED
JUL 25 2017
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers it is ordered that the motion by defendant, Logozza Bros. Construction Corp. for an Order pursuant to CPLR 3212 dismissing the plaintiff, Salvatrice Giambra's Complaint and all cross claims and counterclaims against the defendant Logozza Bros. Construction Corp. and granting said defendant summary judgment; and the motion by defendants/third-party plaintiffs, Ambogio Giannone and Caterina Giannone Family Limited Partnership for an order pursuant to CPLR 3212 granting summary judgment to defendants/third-party plaintiffs, Ambogio Giannone and Caterina Giannone Family Limited Partnership and dismissing plaintiff's complaint and all cross claims; and the motion by defendant, Capezzano Construction Corporation for an order pursuant to CPLR 3212 dismissing plaintiff, Salvatrice Giambra's Complaint and all cross claims as against defendant,

Capezzano Construction Corporation, are hereby joined solely for purposes of disposition of the instant motions and are hereby decided as follows:

The action is one for personal injuries sustained by plaintiff, Salvatrice Giambra, on June 25, 2013, when she allegedly tripped and fell on a defective sidewalk condition while walking on the sidewalk located at 424 Beach 129th Street, Bell Harbor, New York, due to the negligence of defendants.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendants to be liable, plaintiff must prove that defendants either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (see, *id.*).

Movants established a prima facie entitlement to summary judgment by showing that they neither created an unsafe condition nor had actual or constructive notice thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of the motions, movants submit, inter alia, plaintiff's own 50-h hearing transcript testimony wherein plaintiff testified that she was not able to say whether she slipped or tripped on something and that she didn't see how she fell. As movants demonstrated that plaintiff has failed to identify the cause of her fall, movants have established a prima facie case (see, *Curran v. Esposito*, 764 NYS2d 209 [2d Dept 2003]; *Sanchez v. City of New York*, 758 NYS2d 824 [2d Dept 2003]; *Manning v. 6638 18th Ave. Realty Corp.*, 28 AD3d 434 [2d Dept 2006]).

Plaintiff failed to present sufficient evidentiary proof in admissible form to establish a triable issue of fact. In opposition, plaintiff submits, inter alia, plaintiff's own 50-h hearing transcript testimony; the examination before trial transcript testimony of Benny Giannone, Managing Member of Ambogio Giannone and Caterina Giannone Family Limited Partnership; and photographs of the accident scene. Said evidence fails to establish any connection between a defective condition and plaintiff's injuries. There has been no admissible proof submitted establishing what caused plaintiff to fall. While plaintiff's attorney points to excerpts of plaintiff's 50-h hearing testimony wherein she indicates the location of her fall, and that there were a lot of big and small stones on the ground, plaintiff' attorney points to no testimony wherein plaintiff indicates what actually caused her to fall. It is well-established law that mere speculation as to the cause of a fall, when there can be various possible causes is insufficient to raise a triable issue of fact (*Oettinger v. Amerada Hess Corp.*, 15 AD3d [638][2d Dept 2005]).

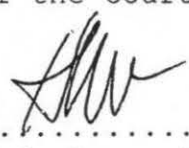
Additionally, while plaintiff asserts that movants' motions are premature in that all depositions of the defendants have not yet taken place, plaintiff has failed to make a showing that "facts essential to justify opposition may exist but cannot then be stated." (See, CPLR 3212[fj). Plaintiff has not even submitted her own examination before trial transcript testimony in opposition to the motions. Plaintiff has failed to rebut movants' prima facie case as plaintiff has failed to raise a triable issue of fact.

Accordingly, as there are no triable issues of fact, summary judgment is warranted, the motions are granted and plaintiff Salvatrice Giambra's Complaint and all cross claims are dismissed

as against defendants, Logozza Bros. Construction Corp, Ambogio Giannone and Caterina Giannone Family Limited Partnership, and Capezzano Construction Corporation.

This constitutes the decision and order of the Court.

Dated: July 18, 2017


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Howard G. Lane, J.S.C.

FILED
JUL 25 2017
COUNTY CLERK
QUEENS COUNTY