Middleton v Long Is. R.R.
2017 NY Slip Op 33499(U)
May 17, 2017
Supreme Court, Nassau County
Docket Number: Index No. 604263/15
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 13**

ELIZABETH MIDDLETON,

INDEX # 604263/15

Plaintiff(s),

Mot. Seq. 2
-against- **Mot. Date 4.19.17**
Submit Date 4.27.17

LONG ISLAND RAILROAD,

Defendant(s). **XXX**

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The following papers were read on this motion: E-File Documents Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	20
Answering Affidavit	28
Reply Affidavit	35

Motion by defendant for an order pursuant to CPLR 3212 directing summary judgment dismissing the complaint is decided as hereinafter provided.

This is an action for personal injuries arising from a slip and fall accident that occurred on March 30, 2013, while the plaintiff was walking in a parking lot adjacent to the Hicksville, Long Island Rail Road (LIRR) station.

Plaintiff testified that on the date of the subject incident, she walked approximately 30 feet in the parking lot when she tripped over a parking barrier or parking stop. Plaintiff further testified that the barrier was partially dislodged from its parking space.

As an initial matter, the court notes that the plaintiff failed to timely commence the instant action prior to the expiration of the statute of limitations. The plaintiff commenced a personal injury action against the LIRR under Index Number 601932/2014 on or about April 28,

2014. By decision and order dated May 5, 2015, Justice Arthur M. Diamond granted the defendant's motion to dismiss for failing to timely serve the defendant pursuant to CPLR 306-b. Plaintiff commenced the instant action on July, 1, 2015, more than two years after the plaintiff's cause of action accrued. Pursuant to §1276 of the New York State Public Authorities Law, a tort action against a public authority such as the LIRR must be commenced within one year and thirty days from accrual (*Burgess v Long Island R.R. Authority*, 172 AD2d 302 [1st Dept 1991]). Plaintiff's reliance on the discretionary extension of time to serve under CPLR 306-b in this case is unavailing because any such extension should have been sought in the previous action.

In any event, even if the court was empowered to equitably extent the plaintiff's time to serve the defendant, for the reasons that follow, the court finds that the defendant is entitled to judgment as a matter of law.

On a motion for summary judgment, the court's function is to decide whether there is a material factual issue to be tried, not to resolve it (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404 [1957]). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Fox v Wyeth Labs., Inc.*, 129 AD2d 611 [2d Dept 1987]; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 132 [2d Dept 1986]). The defendant has made an adequate *prima facie* showing of entitlement to summary judgment.

An out-of-possession lessor may be found liable for failure to repair a dangerous condition, of which it has notice, on leased premises ***if*** the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs (*Chapman v Silber*, 97 NY2d 9, 19 [2001] [emphasis added]). As acknowledged in plaintiff's opposition, "without notice of a specific dangerous condition, an out-of-possession landlord cannot be faulted for failing to repair it" (*Id.* at 20). In addition, the burden is on the plaintiff to prove actual or constructive notice and a reasonable opportunity to repair the dangerous condition (*Litwack v Plaza Realty Invs., Inc.*, 11 NY3d 820, 821 [2008]).

According to the affidavit of Robert Goldberg, Senior Real Estate Manager for the MTA, the parking lot is owned by the MTA and/or the LIRR and is leased to the Town of Oyster Bay (Town) pursuant to a lease agreement dated December 15, 1964. Mr. Goldberg states that the defendant did not retain any responsibility or control for any maintenance or repairs to the subject parking lot.

Indeed, the lease agreement maintains certain limited rights to the LIRR. The section entitled "Improvements" provides that the lessee, Town, is responsible for constructing and maintaining all paving, sidewalks, curbing, lighting facilities and parking signs. The section of the lease entitled "Lessee to Maintain," paragraph 2, provides that the Lessee (Town) is "[t]o keep the said premises, improvements and structures thereon, in good order, repair and painted in a satisfactory condition during the term of the lease. . . ."

The section of the lease entitled "Improvements to Be Kept in Good Repair," paragraph 5, states that the lessee was to "keep the buildings, structures and improvements constructed upon the demised premises in good order and repair. . . ." Likewise, paragraph 6 of the lease entitled "Maintenance of Sidewalks, Etc." paragraph 6, provides that the "Lessee shall and will keep the sidewalk, if any, fronting the demised premises free and clear of snow, ice and any obstructions to the free and safe use of the sidewalk at all times and shall and will keep the sidewalks and curbs in good order, repair and condition, and promptly repair any damage or injury thereto caused in any matter whatsoever."

The lease between the LIRR and the Town thus provides that the Town had the responsibility to maintain the premises, keep the leased premises in good repair and to keep the premises free from snow, ice and any obstructions. According to the affidavit of Matthew Baudier, Branch Line Manager for the Hicksville Station, the LIRR did not assume responsibility for any maintenance or repairs in the subject parking lot where the plaintiff allegedly tripped and fell. Mr. Baudier states that he performed a search of the Hicksville Station maintenance records for two years prior to the date of the accident and found that the LIRR did not perform any repairs, maintenance or snow/ice removal at any of the parking lots in and around the Hicksville station. In addition, Mr. Baudier states that a review of the station records reveals that there have been no complaints or incidents reported to the LIRR regarding a dislodged parking stop or parking barrier in any of the Hicksville LIRR parking lots in the period two years before and until the date of the accident.

Here, there is no evidence that the LIRR breached any statute or regulation (*see Juarez v Wavecrest Management Team*, 88 NY2d 628 [1996]). Nor is there evidence that the LIRR was obligated to maintain and/or repair the parking lot (*see Hernandez v Dunkin Brands Acquisition, Inc.*, 136 AD3d 980 [2d Dept 2016]). As an out-of-possession landlord, LIRR owed no duty to the plaintiff. Moreover, the LIRR has established by the affidavit of Mr. Baudier that it did not have notice of the alleged dangerous condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form (*Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065 [1979]). Conclusory statements are insufficient (*Sofsky v Rosenberg*, 163 AD2d 240 [1st Dept 1990], *aff'd* 76 NY2d 927 [1990]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see Indig v Finkelstein*, 23 NY2d 728 [1968]; *Werner v Nelkin*, 206 AD2d 422 [2d Dept 1994]; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781 [1st Dept 1981], *app dismissed.* 53 NY2d 1028 [1981]; *Jim-Mar Corp. v Aquatic Constr., Ltd.*, 195 AD2d 868 [3d Dept 1993], *lv app denied* 82 NY2d 660 [1993]). In opposition, the plaintiff has failed to demonstrate any issues of fact sufficient to rebut defendant's *prima facie* right of entitlement to summary judgment. Plaintiff concedes that defendant did not have actual notice. In addition, plaintiff has failed to adduce evidence that the alleged defect was visible and apparent and existed for a sufficient period of time prior to the

accident to permit defendant to discover and rectify the situation (*see Melendez v Melmarkets*, 276 AD2d 535 [2d Dept 2000]). In particular, although the plaintiff testified that she believed that the parking stop had been dislodged by a truck or an automobile, there is no evidence in the record tending to establish when that may have occurred.

Accordingly, the motion for summary judgment dismissing the complaint is **granted**. All proceedings under Index No. 604263/15 are terminated.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 17, 2017

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED

MAY 18 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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