

Borges v 880 Fifth Ave. Corp.
2018 NY Slip Op 31805(U)
July 30, 2018
Supreme Court, New York County
Docket Number: 152758/2016
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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JOHN BORGES,

Plaintiff,

-against-

**880 FIFTH AVENUE CORPORATION, BROWN
HARRIS STEVENS RESIDENTIAL MANAGEMENT,
LLC and JAMES KLOPPENBURG,**

Defendants.
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**Index No. 152758/2016
Motion Seq: 001**

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion by defendants for summary judgment dismissing the complaint is granted.

Background

Plaintiff worked for Vignola Trucking & Safe Company ("Vignola"), a company that specializes in safe delivery. On the morning of March 24, 2014, plaintiff was directed to deliver an 875-pound safe to defendant Kloppenburg's apartment at 880 Fifth Avenue in Manhattan. This type of delivery usually involved three people but one of plaintiff's co-workers called in sick that morning, leaving only two employees for the delivery.

Upon arriving at the building plaintiff was told that in order to use the freight elevator, the safe had to be taken down a flight of stairs. The doorman did not want plaintiff to use the elevator located in the lobby. Plaintiff and his co-worker used a stair climber— a device containing a motor that helps lower a safe down stairs.

As plaintiff was navigating the safe down the stairs with his co-worker, plaintiff's right foot

purportedly slipped and plaintiff fell down stairs. Plaintiff testified that he did not know what caused his foot to slip and that he did not notice any debris or problems with the stairs (plaintiff's tr at 64-65). Plaintiff also testified that "my slip caused Gabe [plaintiff's co-worker]— caused Gabe not to be able to hold [the safe] and that's when it came down" (*id.* at 66).

Defendants move for summary judgment on the ground that no dangerous condition existed on the stairs. Defendants claim that surveillance video shows that plaintiff simply mis-stepped and fell down the stairs.

In opposition, plaintiff claims that there is an issue of fact because a strip of tape was missing from the step that plaintiff missed. Plaintiff claims that there should have been some minimal treading to keep the stairs safe especially because the building required deliveries to descend stairs to reach the freight elevator in the basement.

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 a 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], *aff'd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"To be entitled to summary judgment, defendant, as a property owner, was required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property" (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 71, 773, NYS2d 38 [1st Dept 2004] [citation omitted]).

The central issue in this case is whether a dangerous condition existed. The Court finds, after reviewing the video, that no dangerous condition existed and the complaint is dismissed. The video depicts plaintiff walking down the stairs sideways while holding up safe— plaintiff testified that he was supporting some of the weight while his co-worker held up the rest. Plaintiff fell because he missed a step, which caused him to lose his balance and fall down the stairs. The fact that plaintiff missed a step does not automatically create a dangerous condition.

To the extent that plaintiff claims that a strip of tape was missing, the record before this Court does not show that the tape was missing from the step that plaintiff missed. In his opposition, plaintiff instructs this Court to look at the surveillance video for the missing tape (NYSCEF Doc. No. 35, ¶ 12).

But the video does not show that the tape was missing; instead the angle of the video prevents the Court from seeing whether any of the tape was missing.

Plaintiff also provides a picture of the stairs in opposition (NYSCEF Doc. No.37)– that does not create an issue of fact because the photo is not authenticated. The Court has no idea when the photo was taken or what the photo depicts (the picture shows only 3 steps of a staircase). The opposition affirmation references the photo but does not provide any answers about the origin of the photo. And despite the fact that one of the steps is missing yellow and black caution tape in the photo, plaintiff does not offer any evidence that plaintiff missed this particular step.

The deposition testimony of plaintiff's co-worker, Gabriel Young, does not create an issue of fact because plaintiff cannot connect the photo attached in opposition and the ones referenced at Mr. Young's deposition. The photo attached to this motion (NYSCEF Doc. No. 37) is not marked. And, at his deposition, Mr. Young could not recall if he took photos after the accident and claimed that if he had taken photos (apparently, three photos were explored at his deposition) he was trying to depict "the damage that was caused to the steps . . . By the safe" (NYSCEF Doc. No. 36 at 61-62). Additionally, when plaintiff was asked whether there was tape missing on a step, he responded "No, because I never looked" (NYSCEF Doc. No. 30 at 108). There is simply no basis to conclude that plaintiff fell because a step was missing tape: the Court is unable to find that Mr. Young took the photo attached to the opposition or, even if he did, that the photo depicts the step that plaintiff missed. The Court also observes that the photos attached by defendants in support of the motion (NYSCEF Doc. No. 32) do not show a step missing the yellow and black tape.

Accordingly, it is hereby

ORDERED that the motion by defendants for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 3, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH