

Foley v Chateau Rive Equities, LLC
2018 NY Slip Op 31897(U)
August 2, 2018
Supreme Court, New York County
Docket Number: 152941/16
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

TONIANN FOLEY and JUSTIN FOLEY

INDEX NO. 152941/16

MOT. DATE

- v -

MOT. SEQ. NO. 001

CHATEAU RIVE EQUITIES, LLC et al.

The following papers were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
NYSCEF DOC No(s)
NYSCEF DOC No(s)
NYSCEF DOC No(s)

In this action, plaintiff ToniAnn Foley seeks to recover for personal injuries she sustained when she fell on the interior staircase of the residential apartment building owned by defendant Chateau Rive Equities, LLC ("Chateau") and managed by defendant Fortune Financial LLC ("Fortune"). Defendants now move for summary judgment. Plaintiffs oppose the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is granted.

The following facts are based upon plaintiff's deposition testimony. Plaintiff's accident occurred on February 10, 2015. At that time, plaintiff was employed by the United States Postal Office as a letter carrier. Before the accident, plaintiff had just delivered a parcel to Apartment 403. Then, plaintiff began descending the stairs and she held onto the right handrail with her right hand.

Plaintiff's accident occurred on the second step after the first landing of the stairs. Plaintiff put her left foot on the landing, her right foot on the first step after, and then she "put her left foot on the next step, and that's where [her] foot went out from underneath [her], and [she] fell." Plaintiff testified that there was no debris or moisture on the stair that she fell upon and there was adequate lighting. Plaintiff further explained:

- Q. And how would you describe how it went out from underneath you; did it go forward, back, turn, or any other way you could describe it?
A. I went to put my foot down, and it just went forward.
Q. Did it slip on anything?
A. There's nothing there to slip on.

Dated: 8/2/18

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

- Q. Did it slip through? Did it slide, in other words?
- A. Yeah. Well, I slid down the stairs, so.
- ..
- A. As soon as I fell, both of my feet I just went down the stairs.
- Q. And how did you go down the stairs? Did you go butt or did you go forward, or?
- A. I went forward and I hit by butt and I went down, like, four or five steps and then I landed on my back and my neck.

On or about October 7, 2017, plaintiff served an Amended Second Supplemental Verified Bill of Particulars, which states that, "... more particularly, as testified to by [plaintiff] at her deposition, after delivering a package to unit 403, she walked down flights of stairs and, upon reaching the landing just above the bottom of the stairs, she took two steps and fell on the second step after the landing..."

On or about May 18, 2015, plaintiff completed C-3 Workers' Compensation Employee Claim form. On that form, plaintiff indicated that she fell because "the stairs were wet from the snow." At her deposition, plaintiff explained that she wrote that the stairs were wet from snow on the form because:

- A. ...My boss told me I had to write something, and he asked me, why did you fall. And I said, I don't know. And he goes, well, it's wet outside so you probably fell because it was wet, so just write that it's wet.
- Q. He told you to do this?
- A. Yes.
- Q. And you did it?
- A. Yes.
- Q. Even though it wasn't true?
- A. Yeah, I don't know why I fell. And then when I was thinking about it I said, there's no way that they could have been wet because you have to walk through carpet to get to that set of stairs.
- Q. So wetness wasn't a factor in your accident?
- A. Correct.
- Q. And snow wasn't a factor in the accident?
- A. Correct.

Defendants have provided the affidavit of Tony Spaccerelli, who has been employed by Chateau since 2004 and works as a live-in superintendent at the building. Spaccerelli states that he is responsible for general maintenance of the building. Spaccerelli states that he uses and inspects the specific staircase where plaintiff fell on a daily basis. He further states that that no repair work has ever been performed on the staircase, and he has never received any complaints of anyone tripping or falling on any of the staircases in the building.

Defendants also produced Bruce Akrongold for deposition. Akrongold is a principal and the president of Chateau. Akrongold testified that he was personally familiar with the staircase that leads to Apartment 403, and he was not aware of any complaints regarding the staircase prior to plaintiff's accident.

Parties arguments

Defendants argue that they are entitled to summary judgment because plaintiff cannot identify the cause of fall and there was no defective condition on the subject staircase. Defendants have provided the affidavit of Stan A. Pitera, a professional engineer, who inspected the building on May 19, 2017. Pitera states, in pertinent part, that the stair tread where plaintiff fell is not worn and does not violate any of the codes asserted by plaintiff in her bill of particulars. Further, defendants argue that even if there was a defective condition, plaintiff cannot demonstrate notice. Finally, defendants alternatively argue that plaintiff's claims against Fortune should be dismissed because it is a management company, did not own the building and owed plaintiff no duty of care.

In turn, plaintiffs argue that defendants' motion is premised upon a misidentification of the location of plaintiff's accident because "plaintiff has testified that her accident occurred on a staircase at a different location within defendants' building." Plaintiffs' have submitted the affidavit of their expert, Fred De Filippis, also a professional engineer, who also performed a physical inspection of the building on May 19, 2017. De Filippis states in pertinent part that the condition of the staircase where plaintiff fell violates the building code and the Property Maintenance Code of New York State.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

In order to prove defendants' negligence under a theory of premises liability, plaintiffs must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (*Schwartz v. Mittelman*, 220 AD2d 656 [2d Dept 1995]).

On this motion, the court finds that defendants have met their burden. Plaintiff plainly testified at her deposition as to the location of the accident and could not identify any defect which caused her to fall. Plaintiff's opposition on the issue of where the accident occurred does not raise a triable issue of fact on this point. No reasonable fact-finder could conclude on this record that the subject staircase was not reasonably safe.

Indeed, plaintiff's expert inspected the interior stairs from the first to second floor, rather than the stairs leaving Apartment 403 just after the first landing. De Filippis explains that he examined this area because he "was directed by the plaintiff" to that area. However, plaintiff clearly testified at her deposition that she fell on the flight of stairs leaving from Apartment 403 right after the first landing, which is

between the third and fourth floors. Further, plaintiff's bill of particulars confirms her deposition testimony. Plaintiff has not provided an affidavit clarifying the location of her accident. To the extent that plaintiff is changing the location of her accident from her deposition testimony and her bill of particulars, such an amendment would be belated.

In any event, defendants have come forward with sufficient proof to demonstrate the absence of either actual or constructive notice, and plaintiff has failed to raise a triable issue of fact on this point either. This provides a separate basis for a grant of summary judgment in favor of the defendants.

Accordingly, the motion is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed with costs and disbursements; and it is further


ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

8/2/18
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.