Mital v Mount Alverno Residence Corp.
2018 NY Slip Op 34082(U)
September 7, 2018
Supreme Court, Orange County
Docket Number: Index No. EF00 I 960/2016
Judge: Maria S. Vazquez-Doles

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 7th day of September, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ELLEN MITAL,

PLAINTIFF,

-AGAINST-

MOUNT ALVERNO RESIDENCE CORPORATION d/b/a MOUNT ALVERNO ASSISTED LIVING FACILITY and BON SECOURS CHARITY HEALTH SYSTEM, INC.,

DEFENDANTS.

To commence the statutory time for appeals of right (CPLR 5513[a], you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION & ORDER
INDEX #EF001960/2016
Motion Date: 06/22/18
Motion Seq.# 2

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 to 6 were read on the motion by Defendants for summary judgment dismissing the complaint:

PAPERS	NUMBERED
Notice of Motion/Affirmation (Kelland)/ Exhibits A - K	1 - 3
Affirmation in Opposition (Jones) Exhibits 1 - 6	4 - 5
Reply Affirmation (Kelland), Exhibit L	6

The facts here are fairly straightforward. On July 17, 2014, plaintiff was working as a volunteer in the gift shop of Mount Alverno Center. Plaintiff had been a volunteer at the gift shop since the summer of 2013 working 9:00 am to 3:00 pm on Mondays and Wednesdays approximately two to three weeks per month. The gift shop had been converted from a walk-in-closet. In describing the size of the shop, plaintiff testified that there was not enough room for two people inside the shop. On the day of the accident, plaintiff began working around 10:00am and she was the only volunteer working that day. A small fan was positioned on top of the glass

shelving located on the wall opposite the cash register. The fan was plugged into an extension cord approximately twelve feet long and the extension cord was plugged into the outlet at the bottom of the wall.

Plaintiff testified that when she worked at the shop three days earlier, she observed the fan's extension cord tucked behind the glass shelving. On the day of the accident, approximately three hours prior to her fall, plaintiff noticed that the extension cord was no longer tucked behind the glass shelving and the excess cord was coiled up on the floor. There is no evidence as to how or why the cord was moved. Plaintiff did testify that after noticing the cord had been moved, she did not attempt to secure it or move the excess cord off the floor. When plaintiff was ready to close the shop, she pulled the merchandise table from the hallway walking backwards into the shop. When she stepped around the table inside the shop to go back outside, she tripped on the extension cord and fell.

To establish a claim in negligence, plaintiff must show that the defendant owed her a duty to protect her from injury; a duty that only arises when the risk of harm is reasonably foreseeable (*see, Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344 [1928]). Foreseeability of risk is an essential element of a negligence cause of action because a person can only be "negligent" when the event giving rise to the injury could have been reasonably anticipated—and thus avoided with the exercise of appropriate care (*see, Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583 [1997]). Thus, the risk of injury as a result of defendant's conduct must not be merely possible, it must be natural or probable. As the Court of Appeals has instructed, "although virtually every untoward consequence can theoretically be foreseen 'with the wisdom born of the event' ..., the law draws a line between remote possibilities and those that are reasonably foreseeable because '[n]o person

can be expected to guard against harm from events which are ... so unlikely to occur that the risk ... would commonly be disregarded.' " (*Id.* at 583 quoting *Greene v. Sibley, Lindsay & Curr Co.*, 257 N.Y. 190, 192 [1931] [other citations omitted]). Questions of foreseeability are for the court to determine as a matter of law when there is only a single inference that can be drawn from the undisputed facts (*Pepic v. Joco Realty, Inc.*, 216 A.D.2d 95 [1st Dept 1995]).

In *Pirie v. Krasinski*, 18 AD3d 848 [2d Dept 2005] the Appellate Division, Second Department held that a landowner has no duty to warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of ones senses. In *Pirie* a prospective purchaser of the defendant's house was injured when she failed to notice a height differential between a second floor hallway and an adjacent room. The Appellate Division held that the defendant homeowners established their prima facie entitlement to judgment as a matter of law by tendering evidence that the height differential between the hallway and the bedroom was both open and obvious and not inherently dangerous. In opposition, the plaintiffs tendered the affidavit of an architect, who opined that "a single step is a dangerous condition" and that "single steps in interior areas of living spaces are dangerous by their very nature." The Appellate Division held that such generalized, conclusory, and speculative assertions with no independent factual basis were insufficient to defeat a motion for summary judgment.

In *Maraia v. Church of Our Lady of Mount Carmel*, 36 AD3d 766 [2d Dept 2007] the plaintiff, who was participating in a tour of the defendant church, was injured when he fell from a platform in the church. Plaintiff commenced an action against the church, and the church commenced a third-party action against the tour operator. In reversing an order which denied summary judgment to both the church and the tour operator, the Appellate Division held that the

platform was open and obvious and not inherently dangerous.

Depending upon the circumstances of the case, the open and obvious nature of a condition will not entitle a defendant to summary judgment, but will simply be a factor for the jury to determine in apportioning fault. This is demonstrated by *Verel v. Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154 [4th Dept 2007] where the "open and obvious" nature of a condition at a construction site was held to be relevant only to the injured plaintiff's comparative fault, but did not entitle the defendant to summary judgment. The plaintiff in *Verel* was injured when he tripped and fell over three electrical conduits protruding approximately an inch from the concrete floor of a building under construction. After the Supreme Court denied a motion for summary judgment by the subcontractor that installed the conduits, the Appellate Division affirmed, rejecting the subcontractor's contention that it had no duty to warn of the condition because it was open and obvious. Rather, said the Appellate Division, "the open and obvious nature of the allegedly dangerous condition in this case 'does not negate the duty to maintain [the] premises in a reasonably safe condition but, [instead], bears only on the injured person's comparative fault' " (citations omitted).

In her complaint, the plaintiff alleges that the defendants were negligent "in failing to properly maintain the premises in allowing the premises to remain in an unsafe condition; in failing to warn the plaintiff...of the aforesaid dangerous and hazardous condition; in failing to provide a safe environment for the plaintiff, in allowing an electrical cord to be placed along the floor in an improper/unsafe fashion, in creating a dangerous condition; in creating a trap". Defendants argue that they had no duty to warn because plaintiff admitted to observing the electrical cord hours prior to her fall and took no precautions to guard against tripping it.

Further, plaintiff was the only person working in the gift shop that day and there is no evidence that defendants had actual or constructive notice of the fan or the cord. There is no evidence establishing that defendants created the alleged dangerous condition. In fact, Lynn Beers, Volunteer Coordinator, testified that neither she nor the facility provided the fan or extension cord and that she was unaware of the their existence prior to the accident. The defendants have established, prima facie, that they did not create or cause the alleged dangerous condition. They further established that they had no actual or constructive notice of the alleged dangerous condition.

In opposing defendants' motion for summary judgment, plaintiff acknowledged that the electrical cord was in plain view, that she was aware of its presence and that on the day of the accident she noticed it was no longer tucked behind the shelving and the excess cord was coiled on the floor. Plaintiff noticed this hours before her fall. Plaintiff made no effort to move the loose cord out of the way. Further plaintiff claims, for the first time in her opposition, that she was improperly instructed on how to move the display table for merchandise and that the table was not used for its intended purpose which caused plaintiff to fall. Plaintiff claims that defendants instructed her to pull the table into the shop while walking backwards which caused her to not see the coiled up cord. Such claims are not asserted in her Bill and Particulars and plaintiff has not served a supplemental or amended Bill of Particulars.

In reply, defendants submit the Affidavit of Lynn Beers, who specifically states that she first became aware of the fan when she was called to the gift shop following plaintiff's fall and removed it that same day. She further states that the volunteers were never directed or instructed on the manner in which to move the table in and out of the shop. In fact, there was no

requirement that the table be moved at all.

Under the circumstances of this case, the risk of danger of the electrical cord was minimal and unforeseeable as a matter of law. Plaintiff was very much aware of the condition of the gift shop - small space filled with merchandise - it could have reasonably be anticipated that she could trip over the coiled up electrical cord, relieving defendants of any liability. (*Torres v. State*, 18 AD3d 739 [2d Dept 2005].

In light of the above, it is hereby

ORDERED that the defendants' motion summary judgment is granted; and it is further

ORDERED that the complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Any matters not specifically addressed have been considered and denied.

Dated: September 7, 2018
Goshen, New York

ENTER

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of Record via NYSCEF