Concepcion v New Water St. Corp.
2020 NY Slip Op 33042(U)
September 16, 2020
Supreme Court, New York County
Docket Number: 158170/2015
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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TINA CONCEPCION,

Plaintiff,

- v -

NEW WATER STREET CORP., RETIREMENT SYSTEMS OF ALABAMA HOLDINGS LLC

Defendants.

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INDEX NO. 158170/2015

MOTION DATE 08/05/2020

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 138, 139, 140

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, the plaintiff alleges that, on her way to her office on September 28, 2012, a rainy morning, she slipped and fell on a wet floor in the lobby of the defendants' building at 55 Water Street in Manhattan. The plaintiff claims to have suffered injuries to her right knee which required arthroscopic surgery, and sprains and strains to her right hand and her cervical, thoracic and lumbar spine.

By an order dated January 29, 2016, the court denied the plaintiff's motion for leave to enter a default judgment against defendant Retirement Systems of Alabama Holdings LLC, finding that the plaintiff's submissions, the complaint, the plaintiff's affidavit and a workers compensation claim form, were insufficient to establish a *prima facie* case of negligence as to that defendant. The plaintiff did not renew the motion, which must be filed within a year of the alleged default. See CPLR 3215[c]. Discovery was completed and a Note of Issue was filed. The remaining defendant now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is denied.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

A landowner has a duty to maintain premises in a reasonably safe condition. See Gronski v County of Monroe, 18 NY3d 374 (2011); Basso v Miller, 40 NY2d 233 (1976); Westbrook v WR Activities Cabrera-Markets, 5 AD3d 69 (1st Dept. 2004). Landowners may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition. See Parietti v Wal-Mart Stores, Inc., 29 NY3d 1136 (2017). Thus, in premises liability matters, defendants moving for summary judgment have "the initial burden of making a prima facie showing that [they] neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." Amendola v City of New York, 89 AD3d 775 (2nd Dept. 2011). "In order to constitute

constructive notice, a defect must be visible and apparent for a sufficient length of time to permit the defendant's employees to discovery and remedy it (Gordon v American Museum of Natural History, 67 NY2d 836 [1986])." Atashi v Fred-Doug 117 LLC, 87 AD3d 455, 456 (1st Dept. 2011); see Lancaster v New York City Transit Auth., 226 AD2d 145 (1st Dept. 1996).

In support of its motion, defendant New Water Street Corp. submits the pleadings and the deposition testimony of the parties, relying primarily on the deposition testimony of its own witness, Bruce Hodges, its Chief Operating Officer and Vice-President of Tenant Relations and Leasing. However, this testimony, alone, falls short of meeting the defendant's burden on this motion. Hodges testified that defendant Retirement Systems of Alabama purchased defendant 55 Water Street in 1993 for the purpose of managing the building at 55 Water Street, a 51-story tower. In 2012, he was a Project Administrator and his duties were to oversee tenant construction projects and general maintenance of the building. However, he could not recall if he was present at the building on the date of the accident and had no idea of the weather on that day. He testified that the defendant contracted with Guardian Building Services to clean and maintain the building, which would include mopping and laying down mats as needed. He testified that Guardian laid out mats on top of the terrazzo floors between the entrances and the elevator banks, put up wet floor signs and made umbrella bags available when necessary. The plaintiff signed an incident report which states that she lost her balance and fell into a puddle in the lobby near a wet floor sign, and that a "security guard and several other witnesses" were present. Hodges identified the security company hired by the defendant for 2012. Only Hodges was produced and he testified that no one from defendant New Water Street had the responsibility of monitoring the condition of the lobby.

Notably, Hodges was unable to testify in regard to the central issue on the motion, actual or constructive notice of a dangerous condition, and the defendant proffered no other proof to meet that burden. Furthermore, "[a] defendant does not establish its entitlement to summary judgment merely by pointing out gaps in the plaintiff's case" (Giaquinto v Town of Hempstead,

supra at 1049; see Torres v Merrill Lynch Purchasing., Inc., 95 AD3d 741 [1st Dept. 2012]; Sabalza v Salgado, 85 AD3d 436 [1st Dept. 2011]), "but must affirmatively demonstrate the merit of [their] claim or defense." Velasquez v Gomez, 44 AD3d 649, 651 (2nd Dept. 2007); see Torres v Merrill Lynch Purchasing, supra; Alvarez v 21st Century Renovations Ltd., 66 AD3d 524 (1st Dept. 2009). The defendant has not done so.

The plaintiff submits only an affirmation of counsel in opposition. Since counsel claims no personal knowledge of the underlying facts, his affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). However, as stated above, where, as here, the movant fails to meet its burden in the first instance, the motion must be denied regardless of the sufficiency of the opposing papers. While the plaintiff may not be able to meet her own burden of proof at trial, the defendant has not demonstrated that summary judgment in its favor is warranted at this juncture.

Accordingly, it is

ORDERED that the motion of defendant New Water Street Corp. for summary judgment is denied, and it is further

ORDERED that the parties shall contact the court on or before November 30, 2020, to schedule a telephonic settlement conference.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/16/2020
DATE

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER