

Feliciano v 475 Bergen Realty Corp.

2022 NY Slip Op 33699(U)

October 19, 2022

Supreme Court, Kings County

Docket Number: Index No. 501484/2019

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of October, 2022.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
VIRGINIA FELICIANO,

Plaintiff,

-against-

Index No.: 501484/2019

Mot. Seq. No. 4

475 BERGEN REALTY CORP. and WORLD
FAMOUS CORP.,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Affidavits (Affirmations) Annexed	<u>73 - 92</u>
Opposing Affidavits (Affirmations)	<u>96 - 109</u>
Affidavits/ Affirmations in Reply	<u>111 - 115</u>

In this matter, defendants, 475 Bergen Realty Corp. (“Bergen Realty”) and World Famous Corp. (“the Deli) (collectively “defendants”), move pursuant to CPLR § 3212 for an order granting summary judgment in favor of defendants, dismissing the complaint of plaintiff, Virginia Feliciano (“plaintiff”).

Plaintiff commenced this matter by the filing of a Summons and Verified Complaint on January 22, 2019 to recover damages for injuries she allegedly sustained on April 14, 2018 when she slipped and fell in the interior of the premises, known as 475 Bergen Street, Brooklyn, New York, owned by Bergen Realty and leased by the Deli.

Defendants filed the instant motion on June 23, 2021, more than sixty (60) days after plaintiff filed the note of issue on July 2, 2020. However, a review of the record reveals that the note of issue preceded the completion of discovery. In particular, the defendants' depositions of party and non-party witnesses were outstanding. The record further reveals that the defendants moved to vacate plaintiff's note of issue as premature, which was denied by a predecessor justice. Since the final deposition occurred on or about March 8, 2021, the court finds that the instant motion, filed approximately three (3) months later, on June 23, 2021, is within a reasonable time and good cause exists for the defendants' delay in filing such motion. Thus, this court rejects the defendants' contention that the instant motion should be denied as untimely.

On substantive grounds, defendants contend summary judgment is warranted due to the plaintiff's inability to identify the cause of her fall. Defendants point out that the plaintiff has provided contradictory descriptions of the condition on the floor that allegedly caused her to slip and fall. Additionally, defendants argue that they neither created the condition that existed on the floor when plaintiff slipped and fell, nor did they have actual or constructive notice of any such condition. In support of the motion, the defendants submitted, inter alia, a copy of their lease, and evidence in the form of deposition testimony of Mohamed Ali, on behalf of Bergen Realty, Murad Alrawhini, a Deli employee, and plaintiff's relatives, Rafael and Loida Puente.

Bergen Realty contends that it is entitled to summary judgment on independent grounds, since it is an out-of-possession landlord. Bergen Realty argues that it retained

the right to re-enter the deli to perform inspections, make repairs or alterations pursuant to its lease with the Deli but claims that those tasks do not include removing safety mats at the front of the store. Bergen Realty also makes the point that it did not retain the right to manage or control the Deli's methods for cleaning floors, a task that is exclusively performed by the Deli.

Plaintiff maintains that she slipped and fell on a slippery substance that existed on a section of the floor inside the Deli that resulted from floor cleaning the night before. Plaintiff explains that the substance was on the ramp that was at the front entrance of the Deli. Plaintiff claims that such substance was exposed after a deli employee removed portions of the slip resistant mat that usually covers the area.

The proponent of a motion for summary judgment 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 (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d at 853). Once this showing is made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In a premises liability context, the property owner, or the party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition (*Kellman v 45 Tiemann*

Assoc., 87 Ny2d 871, 872 [1995]). The real property owner, or the party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence (*Kyte v Amid-Hudson Wendico*, 131 AD3d 452, 453 [2d Dept 2015]).

In addressing defendants' motion, the court is cognizant that in a slip-and-fall case, a plaintiff's inability to identify the cause of her fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*Louman v Town of Greenburgh*, 60 AD3d 915 [2d Dept 2009]). However, in this matter, plaintiff, in her pleadings and deposition testimony, has consistently alleged that she slipped and fell on a substance that existed on the entrance ramp inside the front section of the deli. Plaintiff testified that the substance was a "slippery soapy residue." She also described the substance as a "transparent, soapy or oily liquid." Plaintiff has further claimed that the substance existed on a section of floor where a safety mat had been partially removed. This is corroborated by the deposition testimony of the Deli's employee, Mohammed Alrawhini¹, who averred that a portion of the mat had been removed contemporaneous with plaintiff's fall. Thus, the court finds that the plaintiff sufficiently identified the cause of her fall.

It is understood that Bergen Realty, as an out-of-possession landlord, may be held

¹Mohammed Alrawhini also testified that a delivery was scheduled to take place around the time of the incident.

liable for injuries that occur on its premises if it retained control and is contractually, or statutorily, obligated to repair or maintain the premises (*Duggan v. Cronos Enters., Inc.*, 133 AD3d 564, 564 [2d Dept 2015]; see *Davidson v. Steel Equities*, 138 A.D.3d 911, 912 [2d Dept 2016]). Bergen Realty has acknowledged that it retained the right to re-enter under its lease with the Deli. It is also undisputed that the substance existed, and plaintiff's fall occurred, on a ramp fixture that was situated at the front entrance of the premises. In fact, plaintiff, in her Bill of Particulars, alleges that Bergen Realty permitted structural defects to exist on the entrance ramp, which caused, or contributed to, her accident. Bergen Realty failed to establish the absence of issues of fact regarding that claim, since it submitted no evidence that the ramp complied with relevant codes sections of the New York City Building Code.

Even if Bergen Realty submitted such evidence, the report of plaintiff's engineering expert, Stanley Fein ("Mr. Fein"), raises issues of fact that preclude summary judgment in favor of Bergen Realty. Mr. Fein concluded that the Deli should have conducted deliveries in a manner that did not require the removal of safety mats, or utilized the sidewalk vault for deliveries. Notwithstanding those conclusions, Mr. Fein also opined that Bergen Realty permitted multiple structural defects to exist, in violation of New York City Building Code Sections 1003.4 (means of egress requires slip resistant surface), 1010.7.1 (ramps shall securely attached slip resistant materials), and 1010.8 (ramps with rise of greater than 6 inches shall have handrails). Consequently, there also exists issues of fact as to whether Bergen Realty maintained the premises in a reasonably

safe manner

Based upon the foregoing, the court finds that there exists issues of fact that preclude summary judgment in favor of the defendants, dismissing plaintiff's causes of action in this matter.

Accordingly, it hereby

ORDERED, that the motion (Motion Sequence 4) of defendants 475 Bergen Realty Corp. and World Famous Corp. is denied.

This constitutes the decision and order of the court.

ENTER



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**