Bolton v ABM 75 Realty LLC
2012 NY Slip Op 31941(U)
July 17, 2012
Supreme Court, New York County
Docket Number: 103348/10
Judge: Joan A. Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 7/23/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 103348/2010
BOLTON, D. BARON
vs
ABM 75 REALTY
Sequence Number : 001
DISMISS

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 17, 2012

[signature], **J.S.C.**

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11
---------------------------------------X
D. BARON BOLTON,

Plaintiff,

-against-

Index No. 103348/10

ABM 75 REALTY LLC., and
MORNINGSIDE REALTY, LLC.,

Defendants.
---------------------------------------X

FILED
JUL 20 2012
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this personal injury action, defendants ABM 75 Realty LLC and Morningside Realty, LLC (together, defendants or ABM & Morningside) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff D. Baron Bolton (plaintiff or Bolton) (motion sequence number 001). Bolton opposes the motion, which is denied for the reasons below.

Background

Bolton alleges that he sustained injuries when he slipped and fell on stairs at 436 East 75th Street in Manhattan, where he resides. In his complaint, Bolton contends that he fell due to the dangerous condition of the staircase in the building owned and managed by defendants (the Building). In his bill of particulars, Bolton asserts that the steps were slippery from dust, dirt or moisture, and did not contain non-skid treads, have required handrails, or uniform riser heights and tread depths, in violation of the Administrative Code of the City of New York (Building Code).

At his deposition, Bolton testified that, on May 30, 2009, at 6:15 A.M., while leaving the Building, he slipped on the top step, or landing, of a staircase of new, polished black-marble steps, "with no adhesive strips" located in the front vestibule (Def. Mov., Exh. E, at 27-28, 55-

61). Bolton stated that there was a handrail on the right side of the stairs, but not the left, that it would have been difficult to reach the existing handrail, and that having one on the left, in the narrow vestibule, would have been helpful when he fell (*id.* at 31). Bolton testified that he fell forward, and that his outstretched left arm made contact with wooden doors located close to the foot of the stairs (*id.* at 55-56).

Plaintiff testified that he had not seen any dirt, dust or debris on the steps before falling, and did not recall looking back at the steps after falling, but stated that had he done so, he would have seen dust, as it was "fairly prevalent" in the area (*id.* at 58-61). Plaintiff testified that he believed that he slipped on something, and "that it was the steps and something made them, um - - either their natural polished marble nature or something on top of it that made me slip, like dust or whatever. It made it, you know, kind - - it's a kind of stone that is slippery, wet or dry" (*id.* at 60). When asked if there was anything on the steps, that caused his accident, plaintiff responded that he believed that there was dust or something that made the polished marble extra slippery (*id.*), and more so than when he had previously used the stairs (*id.* at 75).

Plaintiff testified that he had used the stairs during the two-week period before and the day before he slipped, and did not recall any problems with them (*id.* at 43, 74). Plaintiff testified that the Building's superintendent, Mr. Jay Ceyhun Beyazova, told plaintiff that he had asked, Mr. Yusuf Bildirici, who owns a small percentage of the building, and manages the Building, to place adhesive strips on the steps after they were installed, but before the incident, and said that strips were needed, but that Mr. Bildirici said "no" (*id.* at 50, 98). Plaintiff's testimony suggests that Mr. Beyazova stated that, prior to the incident, he "knew this was going to happen" (*id.* at 50-51). It is undisputed that there was no non-skid strip on the stairs on the

day that plaintiff fell (*id.* at 98), and that he did not complain about the steps before the incident, and knew of no one else who had done so.

The alleged incident occurred on a Saturday, and Mr. Beyazova testified that he cleaned the Building about once a week, on Monday (Def. Exh. H, at 17), but was in the Building three days a week (*id.* at 18), including Fridays, and would have cleaned up any spills that he noticed (*id.* at 50). Mr. Beyazova testified that plaintiff did not tell him why he fell, and that he did not remember talking with Mr. Bildirici about putting strips on the stairs before Bolton's accident, but that he had considered doing so (*id.* at 33). Mr. Beyazova also testified that since the marble was new "it makes you think that it is slippery" (*id.* at 33). He later testified that whether the marble stairs are slippery "depends on what kind of shoes you are wearing." (*id.* at 51).

While plaintiff testified that the stairs had been installed within a few weeks prior to his fall, Bildirici testified that they were installed approximately a year before the incident. (Def. Exh. H, at 44, 49) However, Mr. Bildirici testified that there was no records related to the installation of the stairs (*id.* at 46) Mr. Bildirici further testified that after the accident Mr. Beyazova put adhesive strips on the stairs at plaintiff's suggestion; however, Mr. Bildirici did not recall discussing installation of the such strips with him before plaintiff fell (*id.* at 60, 64) .

ABM & Morningside move for summary judgment arguing that plaintiff's claim should be dismissed because, based on his testimony that he did not see dust on the stairs, he cannot establish what caused his fall or that defendants' alleged negligence was the proximate cause of his injury. ABM & Morningside argue that there is no evidence of their negligence, or proximate cause, or actual or constructive notice to defendants of a dangerous condition, as plaintiff testified that he had no problems ascending or descending the stairs during the two weeks prior to his accident and knew of no complaints with them. Defendants also argue that the simple fact

that a floor is slippery does not support a claim for damages and that evidence of subsequent remedial measures should not be considered on this motion.

Plaintiff counters that ABM & Morningside have not made out a prima facie case for summary judgment, and that triable issues of fact exist as to whether or not defendants were negligent in failing to keep the stairs free from a dust condition that caused plaintiff's fall. Plaintiff points to Mr. Beyazova's testimony that the steps were only cleaned once per week and further contends that defendants installed steps with a slippery surface, and that violated the Building Code, and that these things together caused his fall. Plaintiff also relies on his testimony that, before his fall, Mr. Beyazova stated that he had contemplated applying non-skid strips on the stairs, and inquired of Mr. Bildirici about doing so, but was turned down.

In support of his contention that defendants were negligent, plaintiff points to his testimony that he felt something slippery in his fall, and more slippery than other times that he had used the stairs, and that dust was prevalent in the area. Plaintiff argues that he did not have to see the dust, and provides an affidavit in which he states that he detected it by feel, and that he heard the sound of dust or fine dirt between his shoe and the steps when he fell.

Plaintiff also provides an affidavit of engineer Stanley Fein, P.E. Mr. Fein, who inspected the staircase on August 19, 2009, opines that the steps violated Building Code § 27-375 (h) and good and accepted engineering practice, which requires treads, and landings of treads, to be built of, or surfaced with, non-skid materials (Def. Op., Exh. A, ¶ 11). Mr. Fein stated that, upon his inspection, he found that the steps were covered with precut marble slab, and that plaintiff reported that at the time of the incident there were no non-skid strips on the tread surfaces of the steps (*id.*, ¶¶ 6-8). Mr. Fein opined that the surface of the stairs, without the

nonskid strip, was inherently slippery, would have been rendered more so with dust, and that the presence of nonskid strips would have prevented the accident from occurring.

Mr. Fein also opines that the stairs lacked a handrail on the left side, as required under Building Code § 27-375 (f), and that the handrail on the right was "insufficient" as it did not go all the way up to the top landing area. Mr. Fein states that, once plaintiff lost his footing, he would have had to reach around the wall/doorframe area in order to grab the existing handrail to prevent his fall and that, had defendants complied with the Building Code, he would have been able to grab onto a handrail on the left side. Plaintiff argues that the fact that he injured himself through his outstretched left hand supports his claim that a handrail on the left side of the stairs would have given him something to grab onto, that could have prevented his left hand from smashing into the doorframe, and causing his injury.

In reply, defendants argue that plaintiff's averment that he was caused to slip and fall because of a thin layer of dust on the stairs that made them more slippery should be disregarded because the affidavit was created long after the event, and designed to avoid the consequences of his earlier testimony that he did not recall seeing dust on the stairs. Defendants also point to plaintiff's affidavit assertion that the thin layer of dust was virtually impossible to see without close examination, contending that a hazardous defect must be visible and apparent, and exist for a sufficient amount of time in order to afford constructive notice to a property owner.

ABM & Morningside argue that plaintiff's expert points to alleged defects, but that there is no evidence linking plaintiff's fall to them. Defendants state that plaintiff never mentioned the defects discussed in Mr. Fein's affidavit at his deposition, and maintain that plaintiff's testimony, that he knew of no complaints concerning the stairs and had no difficulty using them prior to the incident, demonstrates that there is no way for him to establish that his alleged accident was

connected to these alleged defects. Defendants also argue that, based on his testimony, plaintiff's assertion that the lack of a handrail caused or would have prevented his injury is speculative.

Discussion

To succeed on a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In deciding the motion, courts are required to view the evidence in a light most favorable to the opposing party, affording that party the benefit of reasonable favorable inferences (*see Negri v Stop & Shop,* 65 NY2d 625, 626 [1985]).

Pursuant to CPLR 3212 (b), a summary judgment motion should be denied if any party shows fact issues sufficient to require trial. In order to reach this threshold and defeat a defendants' motion for summary judgment, Bolton need only present evidentiary materials sufficient to demonstrate a material question of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In this case, even assuming, arguendo, that defendants made a prima facie showing entitling them to summary judgment, Bolton has countered their showing.

Defendants' contention that plaintiff was unable to identify a cause of his fall ignores that, in addition to the dust, Bolton asserted that his fall was caused by several Building Code violations, including Building Code § 27–375 (f) and (h)'s requirements for nonskid surfacing on treads and handrails on each side of the staircase. With plaintiff's testimony that the steps were

not surfaced with nonskid materials when he fell, plaintiff has produced evidence of a violation of the Building Code's requirement.

Sarmiento v C & E Assoc. (40 AD3d 524, 525 [1st Dept 2007]) is instructive.[1] The plaintiff in that case alleged that he fell while descending an interior marble staircase, submitting the inspection of an engineer who opined that the stairs were in an unsafe condition because, among other things, they did not have a nonskid surface, as required by the Building Code, and did not meet the minimum coefficient of friction standard. The Court determined that many of plaintiff's theories of liability lacked merit, including that the stairs were inherently slippery, which, the Court stated, was not in itself a basis for liability, and that plaintiff could not recover on the basis of a wet condition, as there was no actual or constructive notice of that condition (*id.* at 526-527). However, the Court affirmed the lower court's order denying summary judgment because plaintiff's expert opined that the stairs violated Building Code § 27-375 [h] (*id.*). The Court found that there was evidence in the record that the stairs were marble and had been in that condition for many years, and that there was a fact issue, as the defendant failed to meet its burden to demonstrate the inapplicability of Building Code § 27-375 [h] (*id.* at 528). In this case, as in *Sarmiento*, evidence that the stairs lacked a nonskid surface in violation of the Building Code raises an issue of fact as to defendants' negligence.

Regarding causation, while defendants contend that plaintiff did not discuss the non-skid surface defect at his deposition and therefore there is no casual link between the alleged defect and plaintiff's injuries (*Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006]) , the

---

[1]This case is distinguishable from *Garcia-Rosales v 370 Seventh Ave. Assoc., LLC* (88 AD3d 464, 465 [1st Dept 2011]), cited by defendants, which concerned an out-of-possession landlord, and in which the Court noted that the expert affidavit failed to raise an issue of fact because it was not based on a physical inspection of the staircase.

deposition transcript reflects that plaintiff testified as to the lack an adhesive strip on the steps, but was not asked about its role in connection with his injury (*see* Dev. Mov. Aff., Exh. E, at 28, 50, 97-98). In fact, defendants' reference to plaintiff's testimony to support dismissal on the ground that plaintiff cannot identify the cause of his fall is unpersuasive, as defendants, and the transcript, do not demonstrate that plaintiff was asked to identify the cause, or causes, of his fall. Defendants questioned plaintiff about what he observed on the steps, several times, but despite plaintiff's earlier bill of particulars assertion of defendants' violation of Building Code § 27-375 [h] (*see id.*, Exh. D, ¶¶ 3-12), did not query plaintiff about this.[2] Thus, defendants may not rely on the absence of such testimony supporting plaintiff's bill of particulars to argue that a violation of the Building Code provision was not a cause of plaintiff's injuries (*Ruffin v. Chase Manhattan Bank*, 66 AD3d 549 [1st Dept 2009]).

In addition, plaintiff testified that the stairs were slippery, particularly so when he fell, and that they lacked an adhesive strip,[3] and has also submitted an affidavit to this effect, and stating that this was a reason for his fall (Pl. Op., Exh. D, at 2). Moreover, Bolton's expert opines that the lack of nonskid material on the step created a slipping hazard in violation of the Building Code. In his initial report, dated over a year before plaintiff's deposition, Mr. Fein

---

[2]Defendants object to plaintiff's reply affidavit arguing that it is designed to avoid his prior deposition testimony in which he stated that he did not see dust on the stairs. As mentioned, in the reply affidavit plaintiff states that he felt something slippery before he fell and that he heard the sound of dust or dirt between his shoes, which statements are not irreconcilable or wholly inconsistent with his prior deposition testimony (*Kalt v Ritman*, 21 AD3d 321, 323 [1st Dept 2005] ["(if) a reply affidavit can be reconciled with prior testimony, it cannot be regarded as merely a self-serving allegation calculated to contradict an admission made in the course of previous testimony (citation and quotation marks omitted)"]).

[3]The Court in *Sarmiento* noted that, on summary judgment, defendant bore the burden of demonstrating the inapplicability of the Building Code. Defendants do not contend that section 27-375 (h) does not apply, and did not mention the section in moving.

stated that plaintiff reported that the steps did not have nonskid material on them as required in the Building Code (*see* Def. Mov., Exh. I, at 2). Under these circumstances a jury could infer that there is a sufficient link between that provision and what plaintiff claims caused his fall.[4] Accordingly, plaintiff has raised a triable issue of fact as to whether his injury is causally related to a violation of a specific code, and as such violation is evidence of negligence, making inappropriate dismissal of a negligence claim on summary judgment (*see Elliot v City of New York*, 95 NY2d 730, 734 [2001]).

The next issue is notice to defendants of a dangerous condition. "It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk [citations omitted])" (*O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106, 106 [lst Dept 1996]). "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it 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 (citations omitted)" (*Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409, 409 [2d Dept 2004]). Here, as there is no dispute that defendants actually installed the staircase without the nonskid treading or a nonskid surface, defendants' contention of no notice of a defect is unpersuasive.[5]

---

[4]In contrast, plaintiff's reference to the Building Code's requirement of uniform height and depth of the risers in his bill of particulars, is irrelevant as he slipped on the top step.

[5]In light of the foregoing, it is unnecessary to reach the issues of whether the lack of handrail, the presence of dust, or Fein's affidavit with respect to the coefficient of friction raise issues fact as to proximate cause of plaintiff's injury.

Finally, that plaintiff had no difficulty using the stairs prior to the incident does not demonstrate, as a matter of law, that there is no way for him to establish that his alleged accident was connected to the alleged defects. Plaintiff was not required to slip previously to avoid summary judgment. Nothing in *Jenkins v New York City Hous. Auth.* (11 AD3d 358, 359 [1st Dept 2004]), cited by defendants, reflects that it involves nonskid material on steps.

Plaintiff argues that the answer should be struck and summary judgment granted in his favor because, despite demand, defendants have failed to produce a recording from a video camera in the Building's hallway. Plaintiff did not earlier move to compel, and has not moved for this relief here, and his request to strike is denied. Defendants are ordered to produce the video to plaintiff, or, if they fail to produce it, to provide an affidavit with the details of their good faith search for it, within 15 days of service of the date of service of a copy of this order, with notice of entry, upon them by plaintiff.

The court notes that defendants argue that subsequent remedial measures taken cannot be considered on this motion. Plaintiff disagrees. In light of the denial of defendants' motion on other grounds, without consideration of any post-incident remedial measures taken by defendants, it is unnecessary to address this argument.

FILED

JUL 20 2012

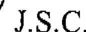
NEW YORK
COUNTY CLERK'S OFFICE

Conclusion

In view of the above, it is

ORDERED that defendants' motion for summary judgment is denied.

Dated: July 17, 2012



J.S.C.