Blaine v 304 W. 88th St. Apt. Corp.

2012 NY Slip Op 32303(U)

September 4, 2012

Supreme Court, New York County

Docket Number: 113702/09

Judge: Judith J. Gische

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SCANNED ON 9/6/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE _____ PART 10

Justice

Index Number : 113702/2009
BLAINE, JEFF
vs.
304 WEST 88 STREET APARTMENT
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

SEP 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

SEP 04 2012

Dated: 9/4/2012

_____, J.S.C.
HON. JUDITH J. GISCHE

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Jeff Blaine,

Plaintiff (s),

-against-

304 West 88th Street Apartment Corp., M&H, LLC and Shaira Construction Corp.,

Defendant (s).

----------x

DECISION/ORDER
Index No.: 113702-09
Seq. No.: 001, 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Motion Seq No. 1	
Shaira n/m (3212) w/SAB affirm, exhs	1
Blaine opp w/MS affirm, JB affid, exhs	2
Shaira reply w/SAB affirm	3
Motion Seq No. 2	
304W88 and M&H n/m (3212) w/CBH affirm, exhs	4
Blaine opp w/MS affirm, RC, JB affids, exhs	5
304W88 and M&H reply w/CBH affirm, exh	6
Other:	
Various stips of adjournment	7

FILED
SEP 05 2012
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a personal injury action in which Jeff Blaine contends the defendants were negligent. Issue was joined and the note of issue was filed January 6, 2012. Presently there are two motions for summary judgment before the court. Since both

motions are timely, summary judgment relief is available (Brill v. City of New York, 2 NY3d 648 [2004]). The motions are consolidated for decision.

Arguments

Blaine is a longtime resident of the building located at 304 West 88th Street, New York, New York. He lives in apartment GB, which is located on the ground floor. Blaine claims that on June 24, 2009 he slipped and fell down the full flight of outdoor stairs located at the building because they were negligently maintained. Specifically, Blaine alleges that the steps were painted with a high gloss paint that rendered them slippery when wet and that non-skid paint should have been used.

Blaine was deposed about the accident. He testified that it occurred in the early evening as he was leaving the building to run an errand. Blaine usually leaves the building using a different set of stairs that are closer to his apartment ("ground floor stairs"). That day, however, Blaine decided to use the other set of exterior stairs to descend from the first floor to the street ("1st floor exterior steps"). Blaine rarely used these exterior stairs because he could use interior stairs to get to the first floor when he needed to. In fact, in the 32 years he had lived at this building, Blaine had only used the exterior stairs leading to and from the 1st floor only a "few times."

Blaine testified at his EBT that on the day of the accident it had been raining all day and was still raining when he set out to do his chores. He claims that when he descended from the building and stepped onto the landing of the steps leading from the 1st floor to the street, it was "like ice," causing him to slip and fall all the way down the stairs until he landed in the street. Blaine stated he had never seen nor heard of anyone else slipping on the exterior steps nor had he himself complained about them.

According to Blaine, he had noticed work being done on the steps in the six (6) month period preceding his accident. The workers had been covering the 1st floor exterior steps "over and over and over again" with a substance. He did not notice anything identifying the company performing the work, such as a company truck, or T-shirt. According to Blaine, the last time he noticed work being done on the 1st floor exterior steps was approximately two (2) months before his accident, which would have been April 2009. It look like they were sanding the steps and filling in holes. Blaine described all the workers as Latino.

Defendant 304 West 88th Street Apartment Corp. is the cooperative corporation ("coop") that owns the building and defendant M&H, LLC was, at the time of plaintiff's accident, the coop's property manager ("property manager"). The coop and the property manager are jointly represented and now move for summary judgment dismissing the complaint and all cross claims against them. Shaira Construction Corp. was the coop's subcontractor, hired by the property manager to do repair work at the building for the coop. Shaira also moves for summary judgment dismissing the complaint and all cross claims against it.

Shaira argues it is entitled to summary judgment because it did not create the dangerous condition alleged, as it did not paint the steps. The coop and property manager argue that they did not have notice of or create the dangerous condition alleged. They also claim that plaintiff cannot prove that a defective condition existed at the building. They contend that even if the stairs were wet and slippery because of the rain, the mere wetness and slipperiness of the steps is not evidence of negligence on their part or of any subcontractor they hired. Furthermore, according to the coop and

property manager, none of the administrative code sections cited by plaintiff (Admin Code §§ 27-372, 27-375 [h] and 27-376) apply to the facts of this case because it was an exterior, not interior, staircase.

With regards to Shaira's motion, a key issue is whether Shaira's employees painted the exterior first floor steps. There are two documents which set forth the terms of the coop's agreement with Shaira. One document, dated April 17, 2008 is a two page letter on the coop's letterhead with a file stamp at the bottom indicating it is a proposal. This letter proposal is signed by Balwinder Singh, Shaira's principal and Steven Haskell, who was then employed by the property manager. The letter proposal is also identified in the reference section of that document as "Scope of work for 304 West 88th Street, Exhibit C" ("Exhibit C"). Exhibit C sets forth the work to be done, including such things as painting the façade of the building, pressure washing the brick, pointing, etc. There are a total of 13 punch list items listed. Below the 13 typewritten items, there appears a handwritten item numbered 14. This item is above the signature block. It states as follows: "14. Steps will patch and paint (*sic*)."

Haskell, who was deposed, acknowledges that he wrote this language in. Singh who was also deposed does not remember whether the language was in the agreement when he signed it or how the contract came about being signed. He cannot recall, for example, whether they signed the contract together (at the same time), or separately. If the contract was signed by the parties separately, Singh does not recall whether he signed the contract first or after Haskell signed it. Singh states that he is barely literate ("I hardly read and write" and "I have a fifth grade education from India...") and that usually he takes contracts home for his daughter to read for him.

When asked whether he noticed the language about patching and painting, Singh replied that it came up after the contract was signed and that he and Haskell had a mild argument about it. He told Haskell painting the steps was not part of what he agreed to do because it was too much work. Singh states that Haskell told him it was in the contract. Singh testified that he told Haskell point blank "I'm not doing this, that's very simple...It's not part of the work, a lot of work, I'm not doing this."

The April 17, 2008 letter proposal also contains a requirement that "[a]ll work to conform to the Burr Evans Engineer's plans dated September 19, 2007 and Apartment Corp's Engineer will inspect all work. See Exhibit D." Exhibit D is a report prepared by Burt A Evans, Jr., P.E., the coop's engineer ("engineer"). The report is entitled "Front Façade and Mansard Roofs," and contains a list of 12 items that need to be taken care of at the building. Patching and painting the 1st floor exterior steps is not listed as one of the items that must be done.

Singh was asked about what work he did at the building. He testified that he did whatever was required by the "scope of work." He explained that he did roof work, brickwork, parapet wall pointing, patching of loose stonework, and painting. He also painted every floor's stonework, using the type of paint recommended by the engineer which Singh identified as being Therolastic paint. He denies that Shaira's workers painted the top of the steps, however, because "this paint we're using, that's not the paint that people walk on the riser." Although he does not know who painted the steps, Singh stated that Shaira only repairs stairs and the work he did for the coop was some minor patch, but nothing on the surface of the steps where people walk on. According to Singh, Shaira is not in the business of painting steps and Shaira has never painted

steps before, regardless of whether they are interior or exterior steps. Singh testified he has no idea what kind of paint would need to be used to paint the steps at issue.

Although Singh could not locate the receipt for the paint he bought for use at the building, he testified that only two color paints were used by Shaira: the Therolastic paint used for all the other outside work and black paint for the handrails. He testified that Shaira completed all work at the building in 2008 and did not do any work at the building thereafter. Shaira provides an invoice dated August 24, 2008 indicating work was completed and seeking payment. He also provides a second bill dated October 13, 2008 indicating the balance due of $55,500.

Haskell testified that "he did not know" whether Shaira actually painted the steps, nor could he identify anyone else who might know whether Shaira had done the work. He does not recall noticing whether the steps had been repainted. When asked whether Shaira did all the work it was hired to do, Haskell responded Shaira did not replace the missing flue breeching section and cap, as Exhibit C to the contract required Shaira to do. Haskell did not know why Shaira skipped over doing that work. Haskell also testified that the coop might have withheld payment to Shaira because it was either unhappy with his work or it was incomplete. Haskell does not know what happened with the project because the coop changed property managers.

Blaine opposes each of the motions before the court. He states that had Shaira failed to paint the steps, as the contract provides, Haskell would have noticed this omission because he regularly visited the building at least once a month and he would have done something about it.

Alternatively, Blaine argues that even if Shaira did not paint the steps, someone

else did and they were negligent in doing the job. Thus, according to Blaine, regardless of whether it was Shaira or another contractor that painted the steps with the wrong type of paint, the coop is not absolved of liability because it is vicariously liable for the negligence of its independent contractor and the work was inherently dangerous. Blaine claims that despite notice of the defective/dangerous condition alleged and having ample time to fix it, the coop failed to take any action. On the issue of notice, the coop relies on the testimony of Haskell who testified that Shaira's work commenced in or about April 2008 and sometime in July 2008, the board met to discuss the patching and painting of the steps. The meeting was held with the coop's architect and the issue of the type of paint to be used was raised. The coop told the the architect to research this issue and coordinate the work. According to Blaine, this raises triable issues about whether the coop knew special paint had to be used on the steps

Blaine also relies on the sworn affidavit of Richard Casado who states that he is a building manager and manages a number of buildings near the subject building, but not 304 West 88th Street. Casado states that he was hired by Myles Share, president of the coop board, to paint the building's interior hallways and perform other work. Casado states that it is his practice to "paint steps with textured pain having a non-skid quality..." He states that he is familiar with Blaine because he seems him in the neighborhood. He noticed that Blaine was limping and asked Blaine what had happened. According to Casado, 2-3 weeks prior to Blaine's accident he:

> [W]arned Myles [Share] that the steps were slippery because they had not used the proper paint. In fact, I had seen the painters painting the 304 West 88th Street steps and, upon inspection, concluded that they were not using non-skid paint, a paint with which I am thoroughly

> familiar. The paint that these workers had used to paint the steps was a highly polished, high gloss paint which becomes slippery when wet. Myles did not seem to be interested and I dropped the subject.

Blaine provides the sworn affidavit of William Q. Brothers, an architect, who opines that sections of the administrative code were violated. He states that Admin Code § 27-375, titled "Interior Stairs" applies, although these were exterior stairs and that Admin Code § 27-376 titled "Exterior Stairs" which provides that exterior used as exits in lieu of interior stairs also applies because there is a requirement that "they comply with all of the requirements of interior stairs..." including that treads and landings "shall be built of or surfaced with nonskid materials." Brothers states that painting the stairs and treads with a paint that does not contain nonskid materials "creates a significant slipping hazard and violates the New York City Administrative Code §§ 27-375 and 27-376. Furthermore, the industry standard for painting outdoor stairs requires that the paint used be of a nonskid material."

In reply, the coop and property manager point out that the architect never did a site inspection, he does not state that the paint used on the stairs was, in fact, the wrong kind of paint, or that the steps were maintained in violation of the Administrative Code sections cited by plaintiff, nor does he opine what kind of paint should have been used. Addressing Casado's affidavit, the coop and property manager reply that it is a "needless distraction" because Casado did not fall, despite numerous visits to the building, and he states the steps are slippery because they used the wrong paint. The defendants contend Blaine's claim is not that the steps are inherently slippery, but that they become slippery when wet.

Discussion

A movant seeking summary judgment in its favor 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]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 NY2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]); Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205 [1st Dept 1990] lv dismissed 77 NY2d 939 [1991]); Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]). The court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (Negri v Stop & Shop, Inc., 65 NY2d 625, 626 [1985]).

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party Perez v. Bronx Park South, 285 AD2d 402 [1st Dept 2001] lv den 97 NY2d 610 [2002]). To prevail on their motions for summary judgment, the defendants must prove no dangerous condition existed (McKee v. State, 75 A.D.3d 893 [3rd Dept 2010]), or if it did exist, that they did not create it or have a sufficient opportunity, within the exercise of reasonable care, to remedy the situation (*see* Gordon v. American Mus. of Nat. Hist.,

67 NY2d 836 [1986]; Lewis v. Metropolitan Transp. Auth., 99 AD2d 246 [1984 *aff'd* 64 NY2d 670 [1984]; *see* Mercer v. City of New York, 223 A.D.2d 688, 689 [1996] aff'd 88 N.Y.2d 955 [1996]; Dombrower v. Maharia Realty Corp., 296 AD2d 353 [1st Dep't 2002]). To defeat the motion, plaintiff must (once the burden shifts to her) raise a triable issue of fact as to whether defendants created the condition or had actual or constructive notice of it.

Shaira has established, through the testimony of Singh, its principal and a person with knowledge of the facts, that it did not paint the tops of the steps leading from the 1st floor to the street, despite the handwritten provision in the April 17, 2008 proposal that Shaira would "patch and paint" the steps. Haskell could not recall whether Shaira painted the tops of the steps, but did recall that in 2009, after Shaira had completed his work, this was the subject of a meeting with the coop's architect. Blaine's argument, that Haskell would have noticed if Shaira had not painted the steps and done something about it, is rank speculation and a shadowy semblance of an issue that cannot defeat a motion for summary judgment where, as here, the movant meets its initial burden (SJ Capelin v. Globe, 34 NY2d 338 [1974]). Having proved that it did not create the dangerous condition alleged, Shaira is entitled to summary judgment dismissing the complaint and cross claims against it because there are no triable issues of fact regarding its negligence. Shaira's motion is, therefore, granted and all claims against it are dismissed.

Turning to the coop and property manager's motion, they have established that they did not have actual or constructive notice of a dangerous condition. Before Blaine's accident, no one had slipped and fallen on the 1st floor steps leading to the

street, nor had they received any complaints about a dangerous condition on those steps. They have also established that neither the coop or its property manager painted the steps. The coop and property manager have also established that Admin Code § 27-375 [h] is inapplicable to the facts of this case, as they are alleged by plaintiff, because that code section pertains to "Interior Stairs," but the stairs where Blaine's accident occurred were exterior stairs. Admin Code § 27-376 applies to Exterior Stairs, but only when they are being "used as exits in lieu of interior stairs." The issue of whether exterior stairs are being used as exits in lieu of interior stairs presents an issue of law for the court to decided (Gaston v. New York City Housing Authority, 258 A.D.2d 220 [1st Dept 1999]). Typically such stairs have a roof and run along the walls, like those seen at many theaters (Gaston v. New York City Housing Authority, supra). The steps at issue do not match these requirements and are, therefore, not exterior stairs used as exits in lieu of interior stairs. Blaine has apparently abandoned his claim based upon alleged violations of other administrative code sections, including Admin Code §§ 27-372, 27-375[f][2], 27-375[e][1] and 27-375[e][2]. These sections are, in any event, inapplicable to the facts of this case, as plaintiff asserts them to be.

In an effort to raise a triable issue of fact, Blaine provides the sworn affidavit of his expert witness, Brothers. Brother has not provided a copy of his curriculum vitae. There is no statement by him that he did a site inspection or examined photographs of the 1st floor stairs. Thus, plaintiff has not made an initial showing that Brothers qualifies as an expert. Leaving that issue aside, Brothers broadly states that "painting stairs and treads with a paint that does not contain nonskid materials creates a significant slipping

hazard" and violates Admin Code §§ 27-375[h] and 27-376. Having decided (supra) that these code sections are inapplicable, and having failed to establish that any other code section obligates the coop to use a special type of paint on the exterior steps, Brothers' opinion has no merit and fails to raise a factual dispute that must be tried.

Casado's affidavit is that he uses non-skid paint when he paints stairs at other buildings. He states that he noticed non-skid paint was being used by workers who were painting the 1st floor steps and that he warned Myles Share, a board member, that the steps were slippery. Casado does not explain how he knew the steps were slippery. There is no statement by him that he stepped on them himself and slipped. Rather, his claim is that the steps were slippery because the workers used different paint than he uses and he uses the right kind of paint. Casado is not, however, offered by plaintiff as an expert, but as a fact witness. Assuming the affidavit is also being offered on the issue of notice, Casado did not warn Share that the steps were slippery when wet, but that the wrong paint was being used. The leap in his affidavit is that Blaine slipped on the wet steps because the wrong paint was used. This and other statements by him are simply expressions of his personal opinion and/or preferences for a certain kind of paint. They do not prove that the coop/property manager did not follow a generally accepted, industry-wide standard in existence at the time of Blaines accident (Hotaling v. City of New York, 55 A.D.3d 396 [1st Dept. 2008]). Casado's affidavit is ineffective against the motion by the coop and property manager for summary judgment because it does not raise a material issue of fact.

Blaine makes no claim that the steps he fell on were defective. His claim is that "[the] landing was wet and slippery and caused me to fall." The Amended Bill of

Particulars states that the steps were not properly painted, defendants failed to use non-skid paint and it was negligent for defendants to have "steps that were particularly hazardous when wet." Having failed to prove that there is any code requiring the steps to be painted with paint of a particular type, or that the coop/property manager did not follow a generally accepted, industry-wide standard in existence at the time of his accident, the remaining issue is whether Blaine has raised any other factual issues to support a claim for common law negligence.

One argument asserted by Blaine is that the steps were "too smooth" and they should not have been slippery when wet. Blaine testified it had been raining all day and was still raining when he set out to take care of his chores. Thus, the water on the landing and steps was the result of an ongoing condition, not an unattended to pooling of water or due to an ongoing problem (compare, Sarmiento v. C & E Associates, 2006 WL 6103160 [Sup Ct., N.Y. Co. 2006] n.o.r.; see also, Conry v. Avellino, 287 AD2d 478 [2nd Dept 2001]). "The mere fact that the exposed stairway was wet from the rain is insufficient to establish a dangerous condition." (Gomez v. David Minkin Residence Housing Development Fund Co., Inc., 85 AD3d 1112, 1113 [2nd Dept 2011]). This argument is, therefore, unavailing.

Another argument is that the coop and property manager are vicariously liable for the negligence by one of their independent contractors, even if it was not Shaira who painted the steps. Not only is there no proof that the steps were negligently maintained, it is well established law that vicarious liability will not attach to a party who engages an independent contractor, unless the employer interferes with and assumes control over the work, or the work is inherently dangerous (see, Whitaker v. Norman, 75

N.Y.2d 779 [1989]). The painting of steps in not inherently dangerous work (Terzo v. Wiederkehr, 270 AD2d 479 [2nd Dept 2000]; Fischer v. Battery Bldg. Maintenance Co., 135 AD2d 378 [1st Dept. 1987]).

Since the coop and property manager have met their burden of proving their defenses and Blaine has not raised material triable issues of fact, the coop and property manager's motion for summary judgment dismissing the complaint and all cross claims against them is granted as well.

Conclusion

Based upon the foregoing,

It is hereby

ORDERED that Shaira Construction Corp.'s motion for summary judgment dismissing the complaint and all cross claims against it is granted and all claims against Shaira are dismissed; and it is further

ORDERED that 304 West 88th Street Apartment Corp. and M&H, LLC's motion for summary judgment dismissing the complaint and all cross claims against them is granted and all claims against 304 West 88th Street Apartment Corp. and M&H, LLC are dismissed; and it is further

ORDERED that the clerk shall enter judgment in favor of defendant Shaira Construction Corp. against the plaintiff dismissing the complaint and against defendants 304 West 88th Street Apartment Corp. and M&H, LLC dismissing their cross claims; and it is further

ORDERED that the clerk shall enter judgment in favor of defendants 304 West 88th

Street Apartment Corp. and M&H, LLC against the plaintiff dismissing the complaint and against defendant Shaira Construction Corp. dismissing its cross claims; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
September 4, 2012

So Ordered:

Hon. Judith J. Gische, JSC

FILED
SEP 05 2012
NEW YORK
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