

Cannella v Restoration Realty Dev. Corp.
2016 NY Slip Op 31415(U)
July 21, 2016
Supreme Court, New York County
Docket Number: 153697/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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THOMAS J. CANNELLA,

Plaintiff,

Index No.: 153697/12

-against-

RESTORATION REALTY DEVELOPMENT CORP,
Defendants.

-----X
JOAN A. MADDEN, J.

In this personal injury action, defendant moves for summary judgment dismissing the complaint against it. Plaintiff opposes the motion, which is denied for the reasons below.

Background

Plaintiff alleges that he was injured on August 14, 2011, at 26 Thompson Street, New York, New York ("the Building"), when he sustained an electric shock when he pushed a button to turn on a light on the wall of Apartment 3D ("the Apartment") where he resides. Defendant is the owner the Building.

According to plaintiff, at the time of the incident, work was being performed at the Building, including on the hall where he resided, which involved "the breaking of walls, some type of electrical and just exposed wires," and that at the time of the incident, work had been proceeding for about a year (Plaintiff's Dep at 45-46). Plaintiff testified that as a result of the work there were exposed electrical wires hanging from the ceiling of the hallways, and that he knew the exposed wires were "live" since they were lit (Id, at 48). He also testified that he spoke to the superintendent and Mr. Rosenblum, who plaintiff identified as the Building owner, about the exposed wires a few times in the months leading up to the incident (Id, at 50). He further testified that Mr. Rosenblum had called him "because I had inspectors coming in and out

constantly because [I] needed to have... the electrical in my apartment repaired” (Id).

Plaintiff also testified that eight or nine months before the incident he made a “housing complaint” that the circuit breaker located in the Apartment’s foyer were “exposed” and that city inspectors came and issued a violation as a result (Id, at 40-45). He further testified that the plate on the breakers were removed by the superintendent “after one of the breakers popped,” and that the superintendent, who was not an electrician, repaired the breaker and failed to put the plate back on (Id, at 42-43).

On the date of the incident, plaintiff was alerted by a neighbor that water was leaking in the walls. Accordingly to plaintiff, eight firemen were in the Building at the time because of the water, and he went up to the roof with them to try to figure out the source of the water. When a lieutenant came to the Apartment and was standing in the hallway, he asked plaintiff to turn on a light so that he could see his paperwork. According to plaintiff, he was shocked when pushed the button to turn on the light in the Apartment’s foyer, which had two outlets next to it. He testified that “when I pushed the button a spark came out and hit me in the head...above the eye, and then ...I was holding the door knob...I felt funny and then I went down (Id, at 79). Plaintiff testified that there was no water in the area where he was injured and was no portion of his body was wet when he pushed the light switch. He also testified that he used the light switch “multiple times” before the accident including approximately 30 to 40 minutes before the accident and nothing happened (Id, at 80).

Defendant moves for summary judgment, arguing that it lacked actual or constructive notice of the condition causing plaintiff’s injuries, citing, Gordon v. American Museum of Natural History, 67 NY2d 836, 837 (1986)(holding that “[t]o constitute constructive notice, a

defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant's employees to discover and remedy it"). In support of this argument, defendant relies on plaintiff's deposition testimony that he had turned on the light multiple times on the date of the accident, and that he had not experienced anything unusual with the switch prior to the accident. Defendants also relies on plaintiff's testimony that he had lived in the Building for forty-five years and had not complained about the electrical outlets and switch involved in the accident.

In opposition, plaintiff argues that defendant has not met its burden as to lack of notice, and that, in any event, plaintiff testified that he had prior difficulties with other electrical outlets and switches prior to the accident. Plaintiff also points to evidence that in or around March 2011, he complained to the New York City Department of Housing and Preservation regarding the electrical system in the Building and the Apartment, including that there was exposed electrical wiring Apartment. He also submits three violations issued to defendant in April and May 2011 related to electrical wiring in the Apartment, including for failing to secure a loose circuit breaker. Plaintiff further argues that constructive notice can be inferred from evidence of a recurring condition based on plaintiff's prior complaints as to repairs to the electrical system in the Building and the Apartment.

In reply, defendant argues that the plaintiff's failure to connect the cause of his injuries, that is a spark coming out of an electrical apparatus to any prior complaints or conditions, establishes its entitlement to summary judgment.

Discussion

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. Center, 64 NY2d 851, 852 (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 a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

“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, Inc., 234 AD2d 106, 106 (1st Dept 1996). However, an “owner cannot be liable for injuries caused to a person as a result of a defective condition on the premises unless it can be shown that the owner either created the hazardous condition or had actual or constructive notice of the condition for a reasonable amount of time that in the exercise of reasonable care, the owner should have corrected it.” Trujillo v. Riverbay Corp., 153 AD2d 793, 794 (1st Dept 1989).

As the proponent of summary judgment, defendant has the burden on demonstrating “the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed.” Giuffrida v. Metro North Commuter R.R. Co., 279 AD2d 403, 404 (1st Dept 2001). In so moving, “the defendant is required to make a prima facie showing affirmatively establishing lack of notice as a matter of law.” Fox v. Kamal Corp., 271 AD2d 485 (2d Dept 2000); see also Dylan P. v. Webster Place Assocs, 132 AD3d 42 (1st Dept 2015).

Defendant has not met this burden, as it fails to provide any evidence from its representative regarding whether or not it had notice of an electrical hazard in plaintiff's apartment. Compare Appleby v. Webb, 186 AD2d 1078 (4th Dept 1992)(reversing trial court's order denying summary judgment to building owners where owners provided evidence that they never experienced any problems with the electrical system that was later found to cause a fire that injured plaintiff).

In any event, even if defendant had met its burden, plaintiff has raised a triable issue of fact as to whether defendant had notice based on evidence that he complained about electrical issues in his Apartment in the months before the accident, and that prior to the accident, violations were issued to defendant regarding electrical system in the Building and the Apartment. Moreover, while evidence that plaintiff had not complained about the specific switch that he pushed before he was shocked may give rise to issues of fact as to foreseeability, it does not provide a basis for granting defendant summary judgment for lack of notice. See e.g Haseley v. Abels, 84 AD3d 480, 483 (1st Dept 2011)(rejecting defendants' argument that they had no notice of the fence lying on the sidewalk where the record contained evidence that the tree fence had been dislodged and that the condition had existed for months before the accident and that the question of whether the fence would obstruct the sidewalk raised issues of fact as to foreseeability); Golden v. Manhasset Condominium, 2 AD3d 345, 347 (1st Dept 2003)(building owner could be held liable where there was evidence owner had actual notice of problems related to exhaust and duct system involved in fire causing damages to plaintiffs).

Next, while defendant relies on Gordon v. American Museum of Natural History, *supra*, to argue that it lacked constructive notice as the defect at issue was not visible and apparent for a

sufficient length of time prior to the accident so that defendant could repair it, such reliance is misplaced. In Gordon, the court found the defendant museum could not be held liable to plaintiff since it had no actual or constructive notice of paper on its steps that caused plaintiff to fall, noting that there was no evidence that anyone observed the paper before the accident or that the paper was dirty or worn. Moreover, while the court in Gordon noted that general awareness of litter on the steps was insufficient to give rise to notice, the factual circumstances here are distinguishable as there is evidence of specific complaints as to the electrical system in the Apartment, which are sufficient to rise to an issue of fact as to notice. Haseley v. Abels, 84 AD3d at 483. Significantly, defendant provides no evidence that it lacked notice of electrical issues in the Apartment.

Finally, based on evidence submitted by plaintiff that there was work being performed on the electrical wiring in the hallway and the complaints made by plaintiff about this work and the electrical issues in his Apartment, the record raises an issue of fact as to whether defendant had notice of an ongoing and recurring condition which allegedly resulted in the injuries to plaintiff. See e.g. David v. New York City Housing Authority, 284 AD2d 169 (1st Dept 2001)(reversing grant of summary judgment based on lack of notice where there was evidence of a recurring water condition in the area where plaintiff fell); Pidgeon v. Metro-North Commuter R.R., 248 AD2d 318, 320-321 (1st Dept 1998)(evidence that leak on roof that caused stairs where plaintiff fell to become wet was a recurring condition of which defendant should have been aware raised issues of fact as to constructive notice of the condition).

Accordingly, defendant's motion for summary judgment must be denied.


Conclusion

In view of the above, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: ~~July 21, 2016~~
July 21, 2016



J.S.C.

**HON. JOAN A. MADDEN
J.S.C.**