SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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JUAN M. RODRIGUEZ, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF ISAURA R. RODRIGUEZ, DECEASED,

Plaintiff,

- against -

9 SHERMAN ASSOCIATES, LLC,

Defendant.

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DECISION AND ORDER

Index No. 150786/2012

Mot. Seq. 002 and 003

Defendant 9 SHERMAN ASSOCIATES, LLC moves under motion sequence 002, pursuant to Uniform Rule 202.21(a) to vacate the October 12, 2015 Note of Issue filed by plaintiff; to dismiss the complaint pursuant to CPLR 3124 and 3126 based on plaintiff's failure to comply with discovery orders; to preclude plaintiff from offering proof at trial concerning special damages, medical issues, collateral source information; and/or in the alternative, to compel plaintiff to comply with all outstanding demands and all discovery flowing therefrom pursuant to CPLR 3124 and 3126. Defendant subsequently moved for summary judgment (mot. seq. 003). The motions are consolidated for disposition.[1]

The court first considers defendant's motion for summary judgment. On a motion for summary judgment, the moving party has the burden to offer sufficient evidence making a prima facie showing that there is no triable material issue of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to establish, through evidentiary proof

[1] The motions were held in abeyance by Order of July 5, 2016 due to the death of the original plaintiff, Isaura R. Rodriguez. In light of the January 9, 2017 order of substitution, the motions are ripe for disposition.

in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 AD2d 129, 130 (1st Dep't 1997). If there is "any doubt as to the existence of triable issues of fact," the motion must be denied. *See Hammond v. State of N.Y.*, 157 AD2d 391, 393 (1st Dep't 1990), *citing Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223 (1978).

Here, the original plaintiff, Isaura Rodriguez, then 81 years old, claimed personal injuries after falling in her apartment building located at 21 Sherman Avenue in the Bronx in October 2011. Ms. Rodriguez testified at her deposition that as she was walking down the staircase from her second floor apartment to her mailbox on the first floor, she slipped and fell. Immediately after her fall, she noticed that there was food, dirt, and grease on the stairs, likely from bags of garbage that had "spilled or exploded," which she believed had caused her to fall. She was not aware of how long those substances had been on the stairs or when building staff had last cleaned the stairs.

According to Salvadore Cruz, who at the time of the accident worked as the porter in the building, it was the tenants' responsibility to bring their garbage from their apartments and down the stairs to a garbage room. Mr. Cruz testified at his deposition that his job responsibilities at that time included, among other things, cleaning the building, including the staircases. He recalled having swept inside the building, as he does every day, on the date of the accident and that he saw no garbage, debris, or grease on the staircases or stains on the floor that day.

In opposition to the motion, plaintiff submitted the affidavits of two witnesses, Diana Lora and Juan Rodriguez, Ms. Rodriguez's son who has since been substituted as plaintiff. In her affidavit, building resident Ms. Lora states that she observed Ms. Rodriguez immediately

after she fell; that Ms. Rodriguez slipped on cooking oil on the steps; that the staircase was dirty and that beer bottles, garbage, and grease or cooking oil had been on the stairs for at least two days prior to the accident; and that the stairs and halls in the building are cleaned sporadically. Ms. Lora stated that the day before the accident, she herself had slipped on that same spot and that juveniles hang out in the halls and on the stairs, drinking and leaving behind beer bottles and garbage. Similarly, Mr. Rodriguez states in his affidavit that plaintiff slipped on cooking oil or grease on the stairs and that garbage and empty beer bottles were on the steps for at least three days prior to the accident. He further states that the staircases and floors in the building are poorly kept and are cleaned once in a while. However, the affidavits were not certified translations, but rather statements taken before a notary that included the following language: "This statement was translated to me from English to Spanish and I find it to be true and accurate." When the motion came before the court for oral argument, plaintiff's counsel sought leave to supplement the opposition with certified translations. The court reserved decision on that issue and before the court issued its ruling, plaintiff submitted certified translations to the court. Thereafter, the plaintiff died and a substitution was made.

Because no affidavits from a translator setting forth his or her qualifications were submitted, the original affidavits are not in admissible form. *See Saavedra v. 64 Annfield Ct. Corp.*, 137 AD3d 771 (2d Dep't 2016). However, if in proper form, the statements contained in the Lora and Rodriguez affidavits would raise a number of triable issues of fact that go to notice, including how long the foreign substances were on the stairs and whether defendant knew or should have known of their existence. The court will, in its discretion, permit plaintiff to correct the defective translated affidavits nunc pro tunc on sur reply and after consideration of the

corrected affidavits, finds that plaintiff has set forth triable issues of fact sufficient to defeat summary judgment. *See Taveras v. Cayot Realty, Inc.*, 125 AD3d 754, 755 (2d Dep't 2015).

The court turns to the motion to strike plaintiff's note of issue, dismiss the complaint for plaintiff's failure to comply with discovery, or preclude plaintiff from offering proof as to special damages, or an order compelling compliance with all outstanding demands. Pursuant to Uniform Rule 202.21(e):

> Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.

See also Nielsen v. New York State Dormitory Auth., 84 AD3d 519, 520 (1st Dep't 2011).

The court notes that before the motion was fully submitted, plaintiff supplemented her discovery responses with additional executed authorizations, as defendant acknowledged. The court declines to strike the note of issue and the motion is granted only to the extent that plaintiff is ordered to provide any remaining outstanding discovery, including responses to those discovery demands post-dating Ms. Rodriguez's death that have already been served, on or before March 21, 2017. Plaintiff's failure to comply with this order shall result in the striking of the complaint. *See Mohel v. Gavriel Plaza*, 123 AD3d 464, 465 (1st Dep't 2014). Accordingly, it is

ORDERED that defendant's motion to strike the note of issue and for other relief (mot. seq. 002) is granted in part as set forth above; and it is further

ORDERED that defendant's motion for summary judgment (mot. seq. 003) is denied.

This constitutes the decision and order of the court.

Date: February 17, 2017

Kelly O'Neill Levy, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.