

Book v Hotel 17 Inc.
2017 NY Slip Op 30512(U)
March 17, 2017
Supreme Court, New York County
Docket Number: 159082/14
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

DONALD RICHARD BOOK,

Plaintiff,

-against-

Index No. 159082/14
DECISION/ORDER
Motion Seq No. 1

HOTEL 17 INC., HOTEL 17 INC. T/A HOTEL 17,
and 17th STREET PROPERTY CO.,

Defendants.

Recitation as required by CPLR 2219 (a), of the papers considered in reviewing defendants Hotel 17 Inc., Hotel 17 Inc. t/a Hotel 17 and 17th Street Property Co.'s (hereinafter, Hotel 17 defendants) motion for summary judgment and plaintiff Donald Richard Book's cross-motion for partial summary judgment.

Papers	Numbered
Defendants' Notice of Motion for Summary Judgment	1
Plaintiff's Notice of Cross-Motion and Opposition to Defendants' Motion	2
Defendants' Reply Affirmation	3
Plaintiff's Reply Affirmation.....	4

Newman, O'Malley & Epstein, LLC (Lawrence Epstein of counsel), for plaintiff.
Gordon & Silber, P.C. (Shawn Wagner of counsel), for defendants.
Gerald Lebovits, J.

The Hotel 17 defendants move for summary judgment dismissing the complaint as against them. Plaintiff has subsequently withdrawn his cross motion for partial summary judgment, but remains in opposition to defendants' motion.

This is a personal injury action involving a "trip and fall" incident. The complaint alleges the following: On November 16, 2013, at approximately 11:30 p.m., plaintiff was walking down the interior staircase from the second floor to the lobby of defendant Hotel 17 (the premises) located at 225 East 17th Street, New York, New York. On his way to the lobby, plaintiff suddenly tripped and fell when he turned alongside the stairway, resulting in severe physical injuries. Defendants allegedly were negligent in the care, custody, maintenance, control, repair and inspection of the staircase; in providing inadequate lighting on the second floor and stairwell; in failing to have proper stair and riser dimensions; and in failing to provide proper handrails on the staircase. Plaintiff alleges that defendants also had actual and constructive notice of the defective condition on the staircase.

Defendants move for summary judgment, asserting that the staircase was not defective or dangerous; that the condition alleged by plaintiff was open and obvious; that defendants had no

notice of any defective condition; and that plaintiff's claim of an optical illusion on the staircase lacks merit. In his opposition to defendants' motion, plaintiff contends that there are issues of fact involving the condition of the staircase, the violation of code standards in the design of the staircase; the adequacy of the lighting, and the position of the handrail.

THE STANDARD FOR SUMMARY JUDGMENT MOTIONS

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted].'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]" (*id.* at 82).

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In support of their motion, defendants submit the deposition testimony of plaintiff, Hotel 17's front desk manager, Syed Mannaf and Hotel 17's general manager, Eyal Siri; an affidavit from Hotel 17's assistant general manager Tariq Khan; and an affidavit from their expert witness Stan Pitera. They also submit photographs of the staircase, which were taken shortly after the incident.

While testifying at his deposition, plaintiff stated that he had suffered a right tibial plateau fracture in 1994, that he suffered from underlying health conditions, and that he last worked eight years prior to the deposition. At the time of the incident, plaintiff stated that he was on his way out of the premises, by taking the elevator from his room on the fourth floor to the lobby. The elevator had stopped on the second floor, and when the doors failed to close properly, he had exited the elevator and went down the stairs.

Plaintiff stated that the staircase curved to the left and that he was unable to see the lobby from the second floor landing. Plaintiff had found the curve to be a sizable landing. While walking, he claimed not to have known the width of the staircase. He stated that there was no one else on the staircase at the time. Plaintiff stated that he held onto the handrail, located on his left side, as he descended the staircase as though the steps were slippery. After walking down four or five steps, plaintiff stated that he turned to his left, where the carpeting changed color from dark purple to a lighter color. He claims that the location of his fall occurred at the intersection between the two shades of carpeting. He also claims that the lighting in that area was low. Plaintiff admitted at the time of the incident that he did not know why he fell, but also claimed that he missed a step (*see* EBT of plaintiff, exhibit 3).

Syed Mannaf testified that his duties on the premises consisted of checking guests in and out, handling payments, and resolving customer issues. He stated that he customarily worked the 4:00 p.m. to 12:00 a.m. shift, five days a week, and identified Eyal Siri as the manager responsible for rugs and lights on the premises. Mannaf testified that he was familiar with the staircase, as he walked up and down it during fire drills. He affirmed that the staircase was carpeted and had a turn to the left as one descended it. Mannaf stated that, while behind his desk, he heard, but did not see, plaintiff fall down the staircase. After the fall, Mannaf spoke to plaintiff and called for an ambulance.

Mannaf stated that he notified the assistant general manager, Tariq Khan, of the incident that evening. Khan thereafter completed an accident report. Mannaf claims not to have been aware of any prior falls or accidents on the staircase (*see* EBT of Syed Mannaf, exhibit 5).

Eyal Siri testified that his duties as general manager consisted of paying bills, doing the payroll, hiring and firing employees, and supervising a staff that cleans, maintains and makes repairs on the premises. He stated that Mannaf notified him by telephone of the incident. Thereafter, Siri stated that he investigated the incident by inspecting the area of the staircase where the fall occurred. He stated that the area is illuminated by two 60-watt light bulbs. He claimed that an engraved rectangular sign, reading "watch your step," hangs in the staircase landing between the second floor and the lobby. Siri also claimed not to have known of any prior falls on the staircase (*see* EBT of Eyal Siri, exhibit 6).

Defendants provide an affidavit from Tariq Khan, who asserts that he was not aware of complaints of tripping or a defective condition on the staircase area. He states that his review of incident reports, generated by employees in the regular course of business, indicate no prior accidents in the subject area (*see* Defendants' aff. of Tariq Khan in support, exhibit 10).

Defendants submit a series of photographs depicting the condition of the staircase area, and a copy of the certificate of occupancy for the premises, dated August 16, 1968. With this material is an affidavit from defendants' expert witness, Stan Pitera, a professional engineer. Pitera states that he based his conclusions on his personal inspection and measurements of the staircase; his review of the deposition transcripts; his review of applicable laws, statutes and code regulations; his review of the certificate of occupancy; and his professional experience.

Pitera avers that the staircase consists of an upper landing that was common to the second floor, an upper flight of stairs, two upper winder treads, an intermediate flight of stairs, two lower winder treads, a lower flight of stairs, and a lower landing that was common to the first floor. The staircase contains planar treads, and was finished with low-level pile carpet that was well adhered to the stairs. The treads measured 10 ½ inches to 11 ¼ inches in depth, excluding the nosing; the stair risers measured 7 ½ inches in height, exclusive of the third riser from the top, which measured 7 ¼ inches in height.

The 45 degree angle in the winder step is slightly in excess of the 40 degree angle

allowed under the Multiple Dwelling Law, but, according to Pitera, the New York City Department of Buildings approved the winder step by issuing its certificate of occupancy in 1968. The certificate specifically provides that the building “conforms substantially to the approved plans and specifications and to the requirements of the building code.”

Pitera states that the treads on the winder steps measured 4 ½ inches, which exceed the minimum requirement of at least four inches under Article 7, section 237 (3), of the Multiple Dwelling Law. The staircase has a rose or mauve color carpet on the upper landing and a distinctly different color carpet on the winder steps, which difference was open and obvious. According to Pitera, the illumination exceeded the requirements of the Multiple Dwelling Law, measuring between 1.03 to 1.43 foot candles on the tread surfaces. Pitera concludes that the area of the staircase where the incident occurred was properly maintained in a safely constructed condition (*see* Defendants’ Expert aff. of Stan Pitera in support, exhibit 7; Defendants’ Certificate of Occupancy, exhibit 9).

Referring to that evidence, defendants argue that plaintiff cannot establish a prima facie case for negligence. Defendants claim that the condition of which plaintiff complained was open, obvious, and not inherently dangerous. Referring to plaintiff’s deposition testimony, defendants state that plaintiff asserted that despite the dim lighting, he had no difficulty seeing as he descended the steps to the lobby, and that he simply missed a step. Defendants contend that, based on the depositions of employees Mannaf and Siri, defendants had no notice, actual or constructive, of any defective condition on the staircase. Based on their expert’s affidavit, defendants contend that the staircase was properly maintained and illuminated at the time of the incident. They state that the certificate of occupancy indicates that the premises complied with the law.

Defendants argue that during his deposition, plaintiff failed to specify the cause of his injuries, simply claiming that he missed a step. They refer to the point in his deposition where plaintiff stated that an optical illusion, created by either the carpet color or carpet pattern, affected his movement. Defendants argue that factors traditionally associated with optical illusions, such as poor lighting, inadequate demarcations between raised and lowered areas, or other distractions, are not relevant here. They specifically point to plaintiff’s testimony that he was not looking at the carpeting when he fell, but was looking straight at “eye level.” Defendants also state that the coloration of the carpeting at the area of the incident was very dissimilar, making an illusion unlikely. Moreover, they argue that the presence of a warning sign in that area, as described by Siri in his deposition, gave adequate notice of a potential hazard. Defendants conclude that absent any negligence on their part, they are entitled to summary judgment and dismissal of the complaint.

Plaintiff opposes this motion, arguing that even if defendants were not on notice of a defective or dangerous condition, they can be held liable for allowing a defective condition to exist. Specifically, plaintiff contends that the design of the winders on the staircase was defective and provided a potential hazard. Plaintiff also questions the design of the handrail that he was using prior to the fall, as well as the absence of a handrail on his right side. He contends that the

certificate of occupancy does not preclude a finding of negligence.

Plaintiff also claims that there is an issue of fact about the level of illumination on the staircase and about the effect of an optical illusion regarding the carpeting. Plaintiff notes that the first section of the steps was carpeted in a dark purple color that created an illusion of a sizeable landing. According to plaintiff, the area where the carpeting changed color was dimly lit and there was a narrow triangular step where he lost his footing and fell.

Regarding the expert affidavit, plaintiff contends that defendants' expert provides conclusory statements about the staircase. Plaintiff also contends that the expert admits that the stair measurements deviated from proper legal specifications. Specifically, the expert asserts that the angle of the winder steps is in excess of the 40 degree angle pursuant to the Multiple Dwelling Law. Plaintiff points out this alleged discrepancy, and questions whether the certificate of occupancy is sufficient to "cure" such a discrepancy.

Plaintiff refers to the affidavit of his expert Michael Kravitz, a professional engineer, who questions the design of the winders, and concludes that they deviate from standards provided by the 1915 Code of Ordinances of the City of New York and the 1901 Tenement House Act, amended to 1915 (Tenement Act). Kravitz attaches to his affidavit a construction diagram of a landing on a staircase, claiming it to be a proper construction. In contrast, the design of the subject staircase is, in Kravitz's words, a violation of section 21 of the Tenement Act. Kravitz concludes that defendants have violated both statutory and common law in the construction and maintenance of the staircase, and that said violations were the proximate cause of plaintiff's injuries (see Plaintiff's Expert aff. of Michael Kravitz in support, exhibit 13). Accordingly, plaintiff contends that sufficient evidence precludes summary judgment.

In reply, defendants argue that plaintiff has provided contradictory evidence, some of which is inconsistent with his deposition testimony. They claim that his statements about lighting and optical illusions lack substance, and that, despite plaintiff's expert affidavit, they have violated no statutes or code requirements.

In order to prove negligence, plaintiff must demonstrate that a defendant either created or had actual notice of an allegedly dangerous condition (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]). The court will address the conflicting expert affidavits, which are decisive in determining whether the motion should be granted. Conflicts between the parties' expert affidavits will not create an issue of fact where the affidavit contradicts the evidence in the record and is speculative (see *Dasent v Schechter*, 95 AD3d 693,693 [1st Dept 2012]). Here, defendants argue that plaintiff's expert affidavit lacks probative value, because the expert failed to address plaintiff's deposition testimony and to substantiate his conclusions. Defendants contend that, unlike their expert, Kravitz failed to provide measurements of the treads or report the angles of the winders. However, Kravitz did read Pitera's affidavit and did make a detailed assessment of its findings.

In his affidavit, Kravitz states that he did take measurements in his inspection of the

staircase. He apparently reviewed photographs of the area of the staircase where the incident occurred and reviewed various laws and ordinances regarding buildings similar to the premises, as well as the certificate of occupancy. Kravitz acknowledges the certificate of occupancy, but declares that the Tenement Law governs the means of egress in buildings such as the premises and is the relevant law with respect to the safety and maintenance of the staircase.

Kravitz cites section 237 (3) of the Multiple Dwelling Law, which provides that “the strings from which the risers radiate shall be curved on a circle of at least one foot diameter, the threads shall be at least four inches wide at the string, not including the nosing, and the angle formed by the face of each riser and the string shall not diverge more than forty degrees from a line normal to the string at the intersection of such riser.” While Pitera states that the top thread of the winder is greater than four inches, Kravitz notes that Pitera does not opine on the lower riser, which is not four inches and which is where plaintiff allegedly lost his footing and fell. Kravitz states that the 45 degree angle in the winder step is a violation of section 21 of the Tenement Act, despite the issuance of the certificate of occupancy. Kravitz also attributes the incident to the placing of the handrails, which directed pedestrians to the narrowest portion of the intermediate winder landing, as well as to the carpeting and lighting. Kravitz concludes that the dark carpeting created a trap-like condition that, under dim lighting, made it difficult for one to distinguish the change in level between the winder threads on either the upper and lower landings.

The court finds that Kravitz’s observations are not speculative and have probative value, and they raise issues about defendants’ compliance with the housing laws, as well as the adequacy of the lighting and carpeting in the staircase. An examination of the photographs, some of which show that the threads on the intermediate winder landing are not visible, leaves the impression that the landing is flat with no changes in level (*see* plaintiff’s photographs, exhibit 12). However, this matter should be left to a jury’s determination.

Accordingly, it is

ORDERED that the Hotel 17 defendants’ motion for summary judgment is denied; and it is further

ORDERED that plaintiff has withdrawn his cross-motion.

Dated: March 17, 2017


J.S.C.

HON. GERALD LEOVITS
J.S.C.