Preston v City of New York
2017 NY Slip Op 30539(U)
February 28, 2017
Supreme Court, Bronx County
Docket Number: 21105/16E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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SEKOU PRESTON,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION/DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, AND NEW YORK CITY HOUSING AUTHORITY,

Defendant(s).
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DECISION AND ORDER

Index No: 21105/16E

In this action for alleged personal injuries sustained as a result of the alleged negligent maintenance of a premises, defendant NEW YORK CITY HOUSING AUTHORITY (NYCHA) moves seeking an order dismissing the complaint against it. NYCHA avers that insofar as it neither owned, controlled, or maintain the premises in which plaintiff alleges he had an accident, it cannot be liable. Plaintiff opposes this motion asserting that it is premature and because in solely negating ownership of the premises, NYCHA fails to negate its liability.

For the reasons that follow hereinafter, NYCHA's motion is granted.

This is an action for personal injuries arising from the negligent maintenance of a premises. The complaint alleges that on

July 29, 2015, while within premises located at 1041 University Avenue, Apartment 3-0, Bronx, NY (1041), plaintiff - a tenant - was injured when a portion of the ceiling collapsed and fell on him. Plaintiff alleges that 1041 was owned, maintained and controlled by defendants, that they were negligent in failing to maintain the same in a reasonably safe condition, and that said negligence caused the accident and injuries resulting therefrom.

Preliminarily, the Court notes that NYCHA conflates the burdens of proof imposed by CPLR § 3211(a)(1) and (7) and CPLR § 3212; utilizing CPLR § 3211(a)(1) and (7) as the basis for dismissal while nevertheless making arguments and submitting proof more appropriate to a motion for summary judgment pursuant to CPLR § 3212. To be sure, pursuant to CPLR § 3211(a)(1) a pre-answer motion for dismissal based upon documentary evidence should only be granted when "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *IMO Industries, Inc., v. Anderson Kill & Olick, P.C.*, 267 AD2d 10, 10 [1st Dept 1999]). Much like on a motion pursuant to CPLR § 3211(a)(7), on a motion to dismiss pursuant to CPLR § 3211(a)(1), the allegations in plaintiff's complaint are accepted as true, constructed liberally and given every favorable inference (*Arnav Industries, Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96

NY2d 300, 303 [2001], *overruled on other grounds by Oakes v Patel*, 20 NY3d 633 [2013] ; *Hopkinson III v Redwing Construction Company*, 301 AD2d 837, 837-838 [3r Dept 2003]; *Fern v International Business Machines Corporation*, 204 AD2d 907, 908-909 [3d Dept 1994]). Significantly, documentary evidence means judicial records, judgments, orders, contracts, deeds, wills, mortgages and "a paper whose content is essentially undeniable and which, assuming the verity of it's contents and the validity of its execution, will itself support the ground upon which the motion is based" (*Webster Estate of Webster v State of New York*, M-65923, 2003 WL 728780, at *1 [Ct Cl Jan. 30, 2003]. Affidavits and deposition transcripts are not documentary evidence establishing relief under CPLR § 3211(a)(1) (*Fleming v Kamden Properties, LLC*, 41 AD3d 781, 781 [2d Dept 2007]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]; *Brown v Solomon and Solomon, P.C.*, 181 Misc 2d 461, 463 [NY City Ct 1999]).

A motion to dismiss pursuant to CPLR 3211(a)(7) is directed at the pleadings where all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). Accordingly, on a motion to dismiss for failure to state a cause of action the court usually doesn't concern itself with evidence beyond the four corners of the complaint. The only exception to

the foregoing is that promulgated by the Court of Appeals in *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]), namely that extrinsic evidence can be used to negate the allegations in the complaint, and when that is the case, dismissal will eventuate because the, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]).

Here, inasmuch as NYCHA's sole submission in support of the instant motion is an affidavit, it is clear that it cannot be accorded relief under CPLR § 3211(a)(1) or (7). Thus, the Court shall treat the instant motion as one for summary judgment rather than dismissal. Inasmuch as plaintiff, by opposing the instant motion solely on the sufficiency of the evidence and on grounds of prematurity, also treats the motion as one made under CPLR § 3212. Thus, he cannot be heard to complain that the instant motion, although denominated as one for dismissal pursuant to CPLR § 3211(a)(7) is treated as one for summary judgment (*Dashnaw v Town of Peru*, 111 AD3d 1222, 1222 [3d Dept 2013] ["[A] court may treat a pre-answer motion as one for summary judgment if it gives prior notice to the parties or, through their submissions, the parties themselves ... demonstrate an intent to deliberately chart a summary judgment course"] [internal quotation marks omitted]; *Elsky v Hearst Corp.*, 232 AD2d 310, 310 [1st Dept 1996] ["Although the IAS court treated defendants' motion as one to dismiss pursuant to

CPLR 3211, this Court will treat it as one for summary judgment, the parties' evidentiary submissions clearly indicating that they were 'deliberately charting a summary judgment course"] [internal quotation marks omitted]).

Treating the instant motion as one for summary judgment, it is hereby granted insofar as NYCHA's evidence establishes that because it neither owned, controlled, or maintained 1041 at the time of plaintiff's accident, it cannot be liable to him.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer

an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). When the proponent of a motion for summary judgment fails to establish prima facie entititlment to summary judgment, denial of the motion is required "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Self serving affidavits, meaning those which contradict previous deposition testimony, will not be considered by the court

in deciding summary judgment and cannot raise a triable issue of fact sufficient to defeat summary judgment (*Gloth v Brusco Equities*, 1 AD3d 294, 294 [1st Dept 2003]; *Lupinsky v Windham Construction Corp.*, 293 AD2d 317, 318 [1st Dept 2002]; *Joe v Orbit Industries, Ltd.*, 269 AD2d 121, 122 [1st Dept 2000]; *Kistoo v City of New York*, 195 AD2d 403, 404 [1st Dept 1993]). While it is clear that self serving affidavits from plaintiff him/herself, contradicting prior testimony shall be summarily disregarded, it is equally clear, that third-party affidavits, from witnesses, which contradict plaintiff's prior testimony shall be disregarded as well (*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 324 1st Dept 2006] [Court discounted affidavit from an eyewitness when the same "was so completely at odds with plaintiff's deposition testimony."]; *Gomez v City of New York*, 304 AD2d 374, 375 [1st Dept 2003]; *Perez v South Park South Associates*, 285 AD2d 402, 404 [1st Dept 2001]; *Philips v Bronx Lebanon Hospital*, 268 AD2d 318, 320 [1st Dept 2000]). The rationale for disregarding self serving affidavits was best articulated in *Glick & Dolleck, Inc. v Tri-Pac Export Corp.* (22 NY2d 439, 441 [1968]) wherein the court stated that while the court is generally proscribed from weighing credibility, it is free to do so when it is clear that the "issues [proffered] are not genuine, but feigned."

Pursuant to CPLR § 3212(f), a motion for summary judgment will

be denied if it appears that facts necessary to oppose the motion exist but are unavailable to the opposing party. Denial is particularly warranted when the facts necessary to oppose the motion are within the exclusive knowledge of the moving party (*Franklin National Bank of Long Island v De Giacomo*, 20 AD2d 797, 297 [2d Dept 1964]; *De France v Oestrike*, 8 AD2d 735, 735-736 [2d Dept 1959]; *Blue Bird Coach Lines, Inc. v 107 Delaware Avenue, N.V., Inc*, 125 AD2d 971, 971 [4th Dept 1986]). However, when the information necessary to oppose the instant motion, is wholly within the control of the party opposing summary judgment and could be produced via sworn affidavits, denial of a motion for summary judgment pursuant to CPLR § 3212(f), will be denied (*Johnson v Phillips,* 261 AD2d 269, 270 [1st Dept 1999).

A party claiming ignorance of facts critical to the defeat a motion for summary judgment is only entitled to further discovery and denial of a motion for summary judgment if he or she demonstrates that reasonable attempts were made to discover facts which, as the opposing party claims, would give rise to a triable issue of fact (*Sasson v Setina Manufacturing Company, Inc.*, 26 A.D.3d 487, 488 [2d Dept 2006]; *Cruz v Otis Elevator Company*, 238 AD2d 540, 540 [2d Dept 1997]). Implicit in this rationale is that the proponent of further discovery must identify facts, which would give rise to triable issues of fact. This is because, a court cannot condone fishing expeditions and as such "[m]ere hope and

speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" (*Sasson* at 501). Thus, additional discovery, should not be ordered, where the proponent of the additional discovery has failed to demonstrate that the discovery sought would produce relevant evidence (*Frith v Affordable Homes of America, Inc.*, 253 AD2d 536, 537 [2d Dept 1998]).

Notwithstanding the foregoing, generally, CPLR § 3212(f) mandates denial of a motion for summary judgment when a motion for summary judgment is patently premature, meaning when it is made prior to the preliminary conference, if no discovery has been exchanged (*Gao v City of New York*, 29 AD3d 449, 449 [1st Dept 2006]; *Bradley v Ibex Construction, LLC*, 22 AD3d 380, 380-381 [1st Dept 2005]; *McGlynn v. Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]). Under these circumstances, the proponent seeking denial of a motion as premature, need not demonstrate what discovery is sought, that the same will lead to discovery of triable issues of fact or the efforts to obtain the same have been undertaken (*id.*). In *Bradley*, the court denied plaintiff's motion for summary judgment as premature, when the same was made prior to the preliminary conference (*Bradley* at 380). In *McGlynn*, the court denied plaintiff's motion seeking summary judgment, when the same was made after the preliminary conference but before defendant had obtained any discovery whatsoever (*McGlynn* at 117).

Under the common law, a landowner is duty bound to maintain his or her property in a reasonably safe condition (*Basso v Miller*, 40 NY2d 233, 242 [1976]). Thus, the owner of a premises is required to exercise reasonable care in the maintenance of his property, taking into account all circumstances such as the likelihood of injuries to others, the seriousness of the injury, and the burden involved in avoiding the risk (*id.*). Accordingly, liability for a dangerous condition within a premises requires proof that either the owner created the dangerous condition or, that he had actual or constructive notice of the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317, 318 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]).

It is well settled there can be no liability on a claim for premises liability absent proof that a defendant actually created the dangerous condition or, alternatively, had actual or constructive notice of the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317, 317 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]; *Allen*

v Pearson Publishing, 256 AD2d 528, 529 [2d Dept 1998]; *Kraemer v K-Mart Corporation*, 226 AD2d 590, 590 [2d Dept 1996]).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group,* 269 AD2d 575, 575 [2000]). Alternatively, a defendant may be charged with constructive notice of a hazardous condition if it is proven that the condition is one that recurs and about which the defendant has actual notice *(Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. Of N.Y.*, 305 AD2d 107, 107 [2003]). If such facts are proven, the defendant can

then be charged with constructive notice of the condition's recurrence *(id.; Anderson* at 422*)*.

Generally, on a motion for summary judgment a defendant establishes prima facie entitlement to summary judgment when the evidence establishes the absence of notice, actual or constructive (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998]; *Edwards v Wal-Mart Stores, Inc.*, 243 AD2d 803, 803 [3d Dept 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD2d 790, 790 [3d Dept 1998]). If defendant meets his burden it is then incumbent on plaintiff to tender evidence indicating that defendant had actual or constructive notice (*Strowman v Great Atlantic and Pacific Tea Company, Inc.*, 252 AD2d 384, 385 [1st Dept 1998]). In addition to the foregoing, a defendant seeking summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, must produce "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Green v Albemarle, LLC,* 966, 966 [2d Dept 2013]).

It is well settled that a prerequisite for the imposition of liability for a dangerous condition within, or, on real property, is a defendant's occupancy, ownership, control or special use of

the premises (*Balsam v Delma Engineering Corporation*, 139 AD2d 292, 296-297 [1st Dept. 1998]; *Hilliard v Roc-Newark Assoc.*, 287 AD2d 691, 693 [2d dept 2001]). Absent evidence of ownership, occupancy, control, or special use, liability cannot be imposed (*Balsam* at 297).

In support of the instant motion, NYCHA submits an affidavit from Laurence Wilensky (Wilensky), Senior Assistant Director in NYCHA's Department of Research & Management Analysis, who states the following: NYCHA maintains a database of all properties owned by it as well as all properties under construction and in planning ; which properties NYCHA will own after construction of those properties is completed. Wilensky performed a search to determine whether NYCHA owned 1041 on September 2015. The search indicated that NYCHA neither owned, managed, maintained, nor control 1041.

Baased on the foregoing, since it is well settled that a prerequisite for the imposition of liability for a dangerous condition within, or, on real property, is a defendant's occupancy, ownership, control or special use of the premises (*Balsam* at 296-297; *Hilliard* at 693) and that absent evidence of ownership, occupancy, control, or special use, liability cannot be imposed (*Balsam* at 297), NYCHA establishes prima facie entitlement to summary judgment. Contrary to plaintiff's assertion, Wilensky's affidavit not only negates ownership of 1041 on the relevant date,

but also negates any assertion that NYCHA, controlled, maintained, or operated 1041.

Nothing submitted by plaintiff in opposition raises an issue of fact sufficient to preclude summary judgment. In fact, plaintiff submits no evidence and instead challenges the sufficiency of NYCHA's evidence, which as discussed above, to no avail. Moreover, to the extent that plaintiff opposes the instant motion as premature given the dearth of discovery, such opposition is unavailing. While it is true, that where as here, there has been no discovery and no preliminary conference, a motion for summary judgment ought to be denied as patently premature (*Gao* at 449; *Bradley* at 380-381; *McGlynn* at 117), the Court will exercise its discretion and grant the motion nonetheless. The record mandates such a result because in this multiple defendant case, NYCHA conclusively negates all basis for its liability under prevailing law, no other defendant opposes the motion, and plaintiff, who could have controverted NYCHA's proof of ownership of the premises by submitting readily available public records, fails to do so. To the extent that plaintiff asserts that Wilensky's affidavit is self-serving, such contention is withouot merit. On this record, there is no evidence that Wilensky's affidavit is at odds with any prior testimony given by him (*Gloth* at 294; *Lupinsky* at 318; *Joe* at 122; *Kistoo* at 404). It is hereby

ORDERED that the complaint and all cross-claims against NYCHA be dismissed, with prejudice. It is further

ORDERED that NYCHA serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : February 28, 2017
Bronx, New York

Ben Barbato, ASCJ