SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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DILLON KLEINMAN, an infant under the age of 14 years, by his father and natural guardian, REID KLEINMAN, and REID KLEINMAN, individually

Plaintiffs

Index No. 156625/12

v

DECISION AND ORDER

NORTHERN BLVD. 4818, LLC, FC NORTHERN ASSOCIATES II, LLC, and FIRST NEW YORK PARTNERS MANAGEMENT, LLC

MOT SEQ 004

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries, the complaint alleges that the infant plaintiff, Dillon Kleinman (Dillon), was injured when an emergency door connecting a stairwell with a rooftop parking lot unexpectedly slammed on his finger as he exited the lot, which was located in a building in Queens owned and/or managed by the defendants. The defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The motion is granted.

II. BACKGROUND

On Saturday, January 22, 2011, Dillon, who was then five years of age, was with his father, the plaintiff Reid Kleinman

(Reid), on the rooftop parking lot of a commercial building in Queens. Dillon observed another family walking ahead of him towards an emergency door that led to a stairwell, and ran ahead of his father to catch up with that family. The door was equipped with a combined mechanical/hydraulic door check on the top of the door that was intended to regulate the speed at which the door closed. It was also equipped with a horizontal emergency bar installed on the garage side of the door which could be pushed towards the stairwell to expedite the opening of the door, and a door latch intended to lessen the force with which the door would shut closed. As Dillon approached the door from the garage side, the family ahead of him proceeded into the stairwell, and let the door close. When Dillon tried to hold the door open, the door closed on his hand, injuring one of his fingers.

III. DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing, by sufficient proof in admissible form, that there are no triable, material issues of fact. Once the movant meets this burden, the opponent must adduce proof in admissible form to raise a triable issue of fact. See CPLR 3212; Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant does not meet this initial burden,

summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851; O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). In premises liability actions, defendants moving for summary judgment have "the initial burden of making a prima facie showing that [they] neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." Amendola v City of New York, 89 AD3d 775, 775 (2nd Dept. 2011); see Pintor v 122 Water Realty, LLC, 90 AD3d 449 (1st Dept. 2011).

In support of their motion, the defendants submit the pleadings, the plaintiffs' bill of particulars, and the affidavits of Michael O'Brien, general counsel of the defendant Northern Blvd. 4818, LLC (NB), which previously owned the subject building, and Jeanne Mucci, an employee of Forest City Ratner Companies, LLC, an entity related to NB. They also submit the transcripts of Dillon's and Reid's deposition testimony, and that of Richard Dzubay, chief engineer for the defendant First New York Partners (FNYP), which manages the subject property on behalf of the current owner, the defendant FC Northern Associates II, LLC (FCNA). In opposition, the plaintiffs rely upon Reid's affidavit and deposition testimony, as well as the depositions of Dzubay and Eira Feliciano, FNYP's managing agent. In reply, the defendants submit an attorney's affirmation.

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition." Gronski v County of Monroe, 18 NY3d 374, 379 (2011) (citations omitted); "That duty is premised on the landowner's exercise of control over the property, as 'the person in possession and control of property is best able to identify and prevent any harm to others'. . . . Thus, a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property." (id. at 379, quoting Butler v Rafferty, 100 NY2d 265, 270 [2003] [some citations omitted]), unless it retained a right of re-entry or was obligated by lease, statute, or course of dealing to keep the subject premises in a safe condition. See Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10 (2nd Dept. 2011). Where a landowner transfers ownership, possession, and control of a building several years prior to the date of an accident that does not arise from a latent defect, it no longer owes a duty to maintain the premises in a safe condition. See generally Bertolino v Town of N. Elba, 16 AD3d 805 (3rd Dept. 2005).

To succeed on a summary judgment motion, a defendant that does have possession or control of premises must show that it did not create a dangerous condition or lacked actual or constructive notice of that condition. See Choudhury v City of New York, 106 AD3d 523 (1st Dept. 2013). In order to make a prima facie

showing that it lacked constructive notice, such a defendant is obligated to show that the condition was neither visible nor apparent for a length of time sufficient to permit it to observe and remedy it. See Gordon v American Museum of Natural History, 67 NY2d 836 (1986). In this regard, the defendants in possession and control of the subject building were required to come forward with evidence of either regular recurring inspections of the door, the specific condition of the door shortly before the accident, or the date on which the door was last inspected or repaired prior to the accident. See Guzman v Broadway 922 Enters., LLC, 130 AD3d 431 (1st Dept. 2015); Rivera v Tops Mkts., LLC, 125 AD3d 1504 (4th Dept. 2015); Mike v 91 Payson Owners Corp., 114 AD3d 420 (1st Dept. 2014); Austin v CDGA Natl. Bank Trust & Canandaigua Natl. Corp., 114 AD3d 1298 (4th Dept. 2014); Thompson v Pizza Hut of Am., Inc., 262 AD2d 302 (2nd Dept. 1999).

NB established that it did not own the premises when the accident occurred, and had not owned it for several years by that time. It further demonstrated that it did not create the allegedly hazardous condition, and, after it sold the premises, retained no right to re-enter, and was not obligated by lease, statute, or course of conduct to make repairs. NB thus demonstrated its prima facie entitlement to judgment as a matter of law. The plaintiffs' opposition, which addressed the condition of the door as of the accident date, and the manner in

which the accident occurred, failed to raise a triable issue of fact. Thus, NB is entitled to summary judgment dismissing the complaint against it.

FNYP and FCNA, which concede that they had possession or control of the building, nonetheless established, prima facie, that they did not create or have actual or constructive notice that the subject door was equipped with a defective door check or door latch, or presented a dangerous condition by virtue of repeatedly slamming shut in a dangerous fashion.

FNYP's Dzubay and Feliciano testified at their EBTs that neither FNYP nor FCNA installed or undertook to repair or alter the door, and that they received no complaints about the door prior to the accident. See Choudhury v City of New York, supra. At his deposition, Dzubay testified that the door was equipped with a mechanical/hydraulic door check, which was installed on a folding metal bar attached to the top of the door, and slowed the speed at which the door closed. He stated that he inspected the subject door once or twice each week during January 2011 to make sure that the door check was operating properly, and thus wouldn't slam shut. Dzubay asserted that he adhered to that schedule, and worked from Monday to Friday.

Although Dzubay could not recall the precise date prior to the accident that he last inspected the door, the accident occurred on Saturday, January 22, 2011, so that, according to his

testimony, the longest possible interval between his most recent inspection prior to the accident and the accident itself would have been five days.

FNYP's Feliciano testified at her deposition that the door was also equipped with a latch as well as a check, and that the latch also served to slow the speed and lessen the force at which the door closed, specifically during the moments when the door ultimately became flush with the door frame. Feliciano further averred that she conducted a full site inspection of the subject property, including an inspection of the subject door to assure that the latch was operating, at least twice per month.

The defendants also rely upon the plaintiffs' deposition testimony, at which Dillon, who was nine years of age when he was deposed, asserted that he saw a family open the door and enter through the doorway several feet ahead of him and that, as he ran to catch up to them, they had already let the door go. He testified that, as he tried to keep the door open with his hand, the door slammed onto his finger. Reid testified that he observed the accident as it occurred, and corroborated his son's version of events. Reid stated that he tested the door check and latch immediately after the accident, and that they were both working properly.

FNYP and FCNA thus established that the door was not dangerous or improperly maintained. That the door was defective,

or improperly maintained, cannot be inferred merely from the fact that, on one occasion, it might have closed fast enough to strike Dillon. "Such inference, absent any other evidence of a defect, is too speculative to impose liability." Hunter v Riverview Towers, 5 AD3d 249, 250 (1st Dept. 2004); see Davila v City of New York, 95 AD3d 560 (1st Dept. 2012).

Where, as here, an inspection was conducted no more than five days prior to the accident, "the door was checked on a regular basis . . . , was checked immediately after the accident and found to be operating normally, and . . . there were no records of complaints or other accidents involving the door" (Rodriguez v 105 E. Clarke Assoc. & LLC, 26 AD3d 204, 205 [1st Dept. 2006]), FNYP and FCNA demonstrated, prima facie, that they lacked constructive notice that the door was defective or dangerous. See id.; McGarvey v Bank of N.Y., 7 AD3d 431 (1st Dept. 2004) (regular inspections of door constitute prima facie proof that defendant lacked constructive notice of any defect); see also McGee v New York City Hous. Auth., 122 AD3d 695 (2nd Dept. 2014) (inspection of allegedly dangerous condition conducted one day prior to accident constitutes prima facie showing of lack of constructive notice); cf. Sperling v Wyckoff Hgts. Hosp., 129 AD3d 826 (2nd Dept. 2015) (same, where inspection was made on date of accident); but cf. Mitchell v Argus Realty Co., 8 AD3d 18 (1st Dept. 2004)(inspection one month

prior to accident is insufficient to establish lack of constructive notice).

Since the plaintiffs' submissions do not include an expert affidavit, they failed to raise a triable issue of fact as to whether the mechanisms installed to prevent the door from slamming shut were defective. See Howell v New York City Tr. Auth., 123 AD3d 439 (1st Dept. 2014); cf. DeGeorge v City of New York, 51 AD2d 991 (2nd Dept. 1998) (plaintiff adduced evidence that the door check was defective). Even if they had raised a triable issue in that regard, the plaintiffs' submissions fail to raise a triable issue of fact as to whether FNYP and FCNA had constructive notice of any such defect, as they failed to refute Dzubay's testimony as to the regularity of his inspections or the timing of his most recent inspection prior to the accident, and they failed to adduce evidence that others had observed the door slamming shut at any time prior to the accident. See Cordeiro v TS Midtown Holdings, LLC, 87 AD3d 904 (1st Dept. 2011)

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted.

This constitutes the Decision and Order of the court.

Dated: April 25, 2017

ENTER: _____

J.S.C.

HON. NANCY M. BANNON