

Isgro v Lev Mgt. Corp.
2011 NY Slip Op 33482(U)
December 9, 2011
Sup Ct, Suffolk County
Docket Number: 08-31197
Judge: Denise F. Molia
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Defendants now move for an order granting summary judgment on the issue of liability contending that they did not create or have notice of the alleged condition, did not breach any duty, and no act or omission on their part proximately caused Officer Isgro's fall. In support thereof, defendants submit the pleadings; the deposition testimony of Officer Jeffrey Isgro; Maghnos Allan Ashby, the former building superintendent employed by defendants on the day of the accident, and Naftuli Folomon, the current field manager; affidavit of Naftuli Folomon; photographs; and line of duty injury report. Defendants argue that Isgro's inattentiveness caused the accident in that he admitted in his testimony that he failed to look at the steps as he descended. Defendants contend that the stairway and building were cleaned, swept and inspected multiple times daily. Lev and 135 Albany assert that the accident occurred in the middle of the night, and that someone must have dropped a bag on the stairs moments before Officer Isgro descended the stairs. Thus, they argue that they did not have actual or constructive notice of the defect and were without sufficient time to remedy it.

In opposition, plaintiffs argue that defendants' statutory violations caused Officer Isgro to fall, making defendants liable by virtue of General Municipal Law §205(e). Plaintiffs submit the affidavits of Officers Anthony Vitale, Officer Peter Stark, plaintiffs' expert Robert Schwartzberg, photographs taken by Officer Stark, and plaintiffs' response to interrogatories. Plaintiffs argue, inter alia, that defendants failed to provide sufficient lighting in the stairwell in violation of §27-381(a) of the New York City Administrative Code, §735.3(a)(4), and §650, §1031.1 of the New York State Uniform Fire Prevention and Building Code, Subchapter B (*Rosabella v MTA*, 23 AD3d 365, 804 NYS2d 771 [2d Dept 2005]). Plaintiffs also argue that defendants failed to establish that they maintained the stairway in a safe and sanitary condition in compliance with §1245.1, §1242.7, Volume B, Subchapter F, Housing Maintenance, of the New York State Code Rules and Regulations.

As a preliminary matter, the court notes that it has considered the unsigned deposition testimony of non-party witness Maghnos Allen Ashby annexed to the defendants' moving papers, as it is certified and an explanation as to why it is not executed was submitted with the instant application (*see McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). By his affidavit, Naftuli Folomon, defendants field manager, attests that he tried to locate Ashby for the purpose of obtaining his signature, but was unable to do so. Foloman attests that Ashby told him on several occasions that he planned to relocate to Trinidad.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of facts (*Alvarez v Prospect Hosp.*, 68 NY2d 320, [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"A defendant who moves for summary judgment in a premises liability case has the initial burden of making a prima facie showing that it 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" (*Bloomfield v. Jericho Union Free School Dist.*, 80 AD3d 637, 638, 915 NYS2d 294 [2d Dept 2011]). A defendant

has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]).

Although the “Firefighter’s Rule” barred firefighters and police officers from recovering damages for injuries sustained in the line of duty (*Santangelo v State of New York*, 71 NY2d 393, 526 NYS2d 812 [1988]), General Municipal Law § 205-e and Gen. Oblig. Law § 11-106 abrogated that rule and now provide injured police officers with a cause of action under circumstances where a defendant’s negligence in failing to abide by a statute or ordinance is the direct or indirect cause of injuries sustained by an officer. In order to establish a prima facie case under General Municipal Law § 205-e, plaintiff must [1] identify the statute or ordinance it alleges defendant violated; [2] describe the manner in which the police officer was injured; and [3] set forth sufficient facts from which it may be inferred that defendant’s negligence directly or indirectly caused harm to the police officer (*Williams v City of New York*, 2 NY3d 352, 779 NYS2d 449 [2004]; *Fahey v Serotta*, 23 AD3d 335, 806 NYS2d 70 [2005]).

Officer Isgro, testified that when he first walked into the building, the lighting was very low, but he did not need to use his flashlight. He testified that as he ascended the stairs, he observed paper debris, similar to tissue paper. When he reached the complainant’s door, he was instructed by his supervisor to return to the first floor. As he descended the stairs, he walked closer to the right side, but he was uncertain whether he grasped the handrail, as was his custom. He did not look at the stairs as he descended, and does not recall seeing debris. He slipped and fell on a small black plastic bag between the third floor and second floor landing, injuring his back and straining his neck.

Maghnos Allan Ashby testified that he was employed by defendant Lev Management Corp. as the building superintendent from 2005 to February 2009. His responsibilities also included maintaining two other buildings. He had an apartment in the basement of the premises. He testified that every morning from 7:00 A.M. to 9:30 A.M. he would clean up the garbage in the hallways, and mop the floors. He stated that tenants usually brought their garbage downstairs and disposed of it in a can located outside the building. The building has 12 apartments, no elevator and only one stairway. It took Ashby 20 to 45 minutes to sweep the stairs and another 30 to 45 minutes to mop the stairs. After he completed his morning cleaning routine, he would make all necessary repairs. He inspected the premises again between 5:00 P.M. and 6:00 P.M. and also completed an inspection of the building on the nights before garbage pickup on Mondays, Wednesday, and Fridays. The garbage night inspections were performed between 10:30 P.M. and 11:00 P.M., but at no exact set time. On Saturdays or Sundays, when a garbage pickup was not scheduled, he inspected the premises between 5:00 P.M. or 6:00 P.M. He testified that although tenants usually would deposit garbage in a can outside the building, sometimes if the trash bag was heavy, tenants would instead leave it outside their doors, never by the steps. He would pick it up upon inspecting the building. He stated that the City of New York made annual inspections to determine if the building was code compliant, and no violations were ever issued as a result of the inspections. Someone told him that a police officer had fallen. On the day of the accident, Mr. Ashby had not observed any garbage or debris on the steps, and he stated the lighting on the steps was fine.

Here, defendants established their prima facie entitlement to judgment as a matter of law by showing that it maintained its premises in a reasonably safe condition (*see Mooney v Petro, Inc.*, 51 AD3d 746, 858 NYS2d 689 [2d Dept, 2008]). Defendants established 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 (*Gordon v American Museum of Natural History, supra*). Maghnos Ashby testified that he mopped and cleaned the premises each morning, inspected the premises for debris in the afternoon, and walked through inspecting the premises in the evening.

In opposition, plaintiffs submit the affidavit of Officer Stark, who attests that he arrived at 2:00 A.M., responding to a call about an emotionally disturbed person. He attests that the police department was called to respond to complaints at that building at least once a week and as many as two to three times a week. The building was poorly maintained and illuminated. Officer Stark took photographs shortly after the accident.

Plaintiffs also submit the affidavit of Officer Anthony Vitale, who attests in his affidavit that on several occasions he responded to calls at the premises and the conditions were always the same: dirty, with garbage and debris strewn about and dimly lit. On the day of the accident, he attests that there was debris on the stairs and he witnessed Officer Isgro's fall. He stated that the light fixtures did not provide adequate illumination, but he did not use his flashlight as he was already carrying his radio and paperwork. Vitale attests that Officer Isgro slipped while going down the stairway between the third and second floor on a plastic bag that was left or discarded on the dark stairway. He was present when photographs were taken by fellow Officer Peter Stark. He attests that the two photographs taken without a flash depicting the lighting and the light fixture are a fair and accurate representation of the lighting in the stair well where plaintiff fell.

Plaintiffs' expert, Robert Schwartzberg, by affidavit attests that he is a licensed, registered engineer in New York State and provides consulting engineering services including the evaluation of conditions with respect to building safety, code compliance and design. Schwartzberg stated that he found the conditions depicted in Officer Stark's photographs taken on the day of the incident, which Stark authenticated, were substantially similar to the conditions that he observed at the time of his inspection. The bulbs were only 22 watt fluorescent circline style bulbs, placed in fixtures at the top of each landing. He took light meter readings at the site of the accident. He opines that the artificial lighting in the stairwell was insufficient for safe travel in residential space, in violation of the New York State Uniform Fire Prevention and Building Code §735.3, §1031.1, Subchapter B, the New York City Administrative Code §27-381(a); and the State of New York Code Rules and Regulations; Volume B, Subchapter F, Housing Maintenance, Part 1242, §1242.7, Part 1245, Section §1245.1 in that defendants failed to maintain the stairway and keep it free of debris, creating an unsafe condition. Schwartzberg further opines that these violations were the direct or indirect cause of Officer Isgro's accident.

In opposition, plaintiffs have demonstrated that material issues of fact exist as to whether defendants had constructive or actual knowledge of recurring conditions of poor lighting and debris throughout the building. Further, a question of fact exists as to whether Officer Isgro's slip and fall was practically or reasonably connected to defendants' failure, over an extended period of time, to provide sufficient lighting in violation of §27-381(a) of the New York City Administrative Code, §735.3(a)(4),

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§650, §1031.1 of the New York State Uniform Fire Prevention and Building Code, Subchapter B (*Rosabella v MTA*, 23 AD3d 365, 804 NYS2d 771 [2d Dept 2005]); and to maintain the stairway in a safe and sanitary condition in compliance with the State of New York Code, Rules, and Regulations, §1245.1, §1242.7, Volume B, Subchapter F, Housing Maintenance. Thus, the adduced evidence raised material issues of fact as to whether recurring statutory violations such as insufficient lighting, combined with garbage on the steps contributed to the cause of the accident, thereby precluding summary judgment (General Municipal Law §205[e]).

Accordingly, defendants' motion for an order granting summary judgment dismissing the complaint is denied.

Dated: 12/9/11

Hon. Denise F. Molia
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION