Vinasco v Sebco/Banana Kelly Assoc.
2015 NY Slip Op 31729(U)
August 25, 2015
Supreme Court, Bronx County
Docket Number: 305694-11
Judge: Fernando Tapia
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13

ELIZABETH VINASCO

Plaintiff,

v.

Index No. 305694-11

SEBCO/BANANA KELLY ASSOCIATES

Defendants.

DECISION

On October 26, 2010, approximately 7 p.m., Plaintiff, Ms. Elizabeth Vinasco, slipped and fell while descending a set of stairs inside 915 Kelly Street, a residential building in Bronx, NY. Ms. Vinasco sustained injuries to her right ankle as a result of the slip and fall.

Defendants move for summary judgment under CPLR 3212(b), claiming that Ms. Vinasco failed to show that Defendants were negligent.

After careful review of the motion papers, this Court hereby **DENIES** Defendants' motion.

Were Defendants negligent? Did Defendants have constructive notice of the loose handrail? Were Defendants' negligence the proximate cause of Plaintiff's right ankle injuries? This Court answers "yes" to all of these questions.

I. FACTUAL BACKGROUND

Plaintiff, Ms. Vinasco, sustained right ankle injuries when her footing was compromised while descending an interior seven-step staircase that lead to the residential building's main door.[1] She was accompanied by her two adult sons and an adult nephew. See Vinasco Tr. at p. 20, lines 4-14. Ms. Vinasco's oldest son, Mr. Jorge Carvahal, was the first one to reach the bottom of the subject stairs. See Clavijo Tr. at p. 18, lines 20-25. Behind Mr. Carvahal was his half-brother, Mr. Gabriel Clavijo, and

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[1] The accident was at 915 Kelly Street, Bronx, NY 10459. See Defs.' Memorandum of Law at p. 2. Ms. Vinasco and her adult son, Mr. Jorge Carvahal, submitted to depositions with the aid of Spanish language interpreters.

behind Mr. Clavijo was Ms. Vinasco, who was walking beside her nephew, Mr. Jorge Luis. Id. Mr. Clavijo took photos of the subject stairs and handrails. Id. at p. 32, lines 7-14.

The subject staircase was never reconstructed; that is the building's original staircase. See September 2, 2014 Ettari Aff. at ¶¶ 29-30.[2] Free from holding anything in her hands, Ms. Vinasco instinctively braced herself from falling by grabbing onto the handrail that was to her left. See Vinasco Tr. at p. 23, lines 12-14 & lines 18-25. Because of the fall, her right leg was in a cast and she had surgery on October 28, 2010, in which the surgeon placed platinum and screws. Id. at pp. 47-48.

Mr. Marco Robles was the superintendent of the building, and Mr. Johnny Toro was the porter. Although Ms. Vinasco did not report her accident to anyone in the building, Mr. Akinbobla Modupe was the risk manager for the building and he received the incident report from Mr. Toro. See Modupe Tr. at p. 10, lines 4-20 & p. 11, lines 2-14; Vinasco Tr. at p. 44, lines 10-24; Kuriloff Opp. at ¶ 17.

Ms. Vinasco lives in Bronx, NY.

II. SUMMARY JUDGMENT MOTIONS AND THEIR HIGH THRESHOLD

One of the recognized purposes of a summary judgment motion is to determine if any material facts exist. *Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 AD2d 537 (App Div, 1st Dept 1976). Under CPLR 3212(b), a motion for summary judgment must be supported by affidavit, a copy of its pleadings, and any other available proof. Regarding the affidavit, not only must it have a recitation of material facts, but it must also show that there is no defense to the action, or that the defense is meritless.

Because a motion for summary judgment has an extremely high burden ["as a matter of law"], it is a drastic remedy for any movant to use. *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 (App Ct 1978). It is therefore the movant's burden to produce evidence as would be required in a trial. *Oxford Paper Co. v. S.M. Liquidation Co., Inc.*, 45 Misc2d 612, 614 (Sup Ct, NY Cty 1965); see also *Pirrelli v. Long Island Rail Road*, 226 AD2d 166 (App Div 1st Dept 1996) (the purpose of the motion court is issue-

[2] Mr. Vincent A. Ettari is the expert for Defendants/Movants; Mr. Raymond Schwartzberg is the expert for Plaintiff.

finding, and not issue-determination). Lastly, a summary judgment motion cannot be defeated by a "shadowy semblance of an issue." *Hatzis v. Belliard*, 13 AD3d 106 (App Div, 1st Dept 2004).

Here, there are too many material issues of fact that must be resolved at trial, should the parties not settle out of court, or should private mediation reach an impasse. Not only is there an issue with constructive or express notice about the subject handrail's condition, but there are also competing experts' affidavits that warrant defeat of Defendants' summary judgment motion.

III. DEFENDANTS HAD ENOUGH ACTUAL AND CONSTRUCTIVE NOTICE OF THE INTERIOR HANDRAIL

When descending the subject staircase, the handrail on the left side was loose at the bottom. Ms. Vinasco attested that she noticed that the handrail was not secured to the wall earlier that day, when she ascended the subject staircase approximately noon. See Vinasco Tr. at p. 26, lines 10-14. Prior to that, she noticed the handrail to be loose for at least three to four months before her accident. See Kuriloff Opp. at ¶ 13. In addition, her son, Mr. Carhaval, also noticed that the subject handrail was loose, albeit on the day of the slip and fall. See Carhaval Tr. at p. 21, lines 20-25.

Although she did not inform anyone in the building about the subject handrail's condition, Ms. Vinasco's attorney aptly asserted that Defendants had to have been on notice about the subject handrail's fragile condition because the other handrail had vertical support at the bottom of the staircase. Id. at ¶¶ 11 & 14. A defendant seeking summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition, or that it did not have constructive or actual notice of its existence. *Sabalza v. Salgado*, 85 AD3d 436, 437-38 (App Div, 1st Dept 2011).

Here, Mr. Modupe, the building's risk manager, attested in support of Defendants' motion that he had no complaints about the subject handrail prior to the slip and fall. See Modupe Tr. at p. 29, line 25 & p. 30, lines 2-4. He, however, also attested that he did not know when the handrail was last painted, or whether the screw that was at the foot of the handrail was painted over. Id. at p. 39, lines 2-12.

Additionally, he did not know if the Maintenance Department of the building that he works for

keeps a log of complaints. Id. at p. 32, lines 10-17. He did, however, know that if a tenant has any complaints, s/he would go to the Maintenance Department. Id. at p. 29, lines 5-16. Mr. Modupe's testimony raises questions about the building's lack of practice of cataloging work tickets and addressing repairs, whether big or minute.

It can therefore be inferred by his testimony that the work repair logs could indeed have handrail work tickets, especially since Mr. Modupe attested that generally, there are no work tickets written for something like screwing tight a screw. Id. at pp. 53-54. It is a defendant's burden to show lack of notice as a matter of law. *Giuffrida v. Metro North Commuter R. Co.*, 279 AD2d 403, 404 (App Div, 1st Dept 2001). More specifically, where the defendant had no actual notice, that defendant must show the lack of evidence regarding how the alleged condition came about, how visible and apparent it was, and for how long a period of time prior to the accident it existed. *Id.*

As previously mentioned, Mr. Vinasco's attorney asserted that the opposite handrail had additional support by way of a vertical pole. See Kuriloff Opp. at ¶ 11. When asked about that vertical pole found on that handrail, Mr. Modupe attested that he did not know why there were metal poles attached to that handrail, but not to the subject rail. See Modupe Tr. at p. 43, lines 14-18. Although Defendants contend that a "general awareness" is insufficient as "notice,"[3] the vertical poles are enough proof that Defendants had both actual and constructive notice that the dual handrails were faulty to some extent because it is reasonable for Defendants to foresee the potential dangerous condition of both handrails. It therefore made no difference that Ms. Vinasco, her sons, and her nephew did not inform Defendants about the loose handrail because Defendants themselves placed the vertical anchors on the handrail. Their motion is therefore denied, as they failed to prove that there was a lack of constructive or actual notice as a matter of law.

[3] See Benowitz Reply at ¶ 36.

IV. PROXIMATE CAUSE IS A GENUINE ISSUE OF FACT

A. The poor condition of the handrail was a proximate cause of the slip and fall

It is common knowledge that the primary purpose of handrails is to assist those ascending or descending stairs. The same is true for handrails found inside elevators and ramps. Here, Ms. Vinasco's attorney underscores the fact that the subject handrail failed to provide the support needed when someone starts to fall. See Kuriloff Opp. at ¶ 13. In addition, she claims that the loose handrail was the proximate cause of her slip and fall. Defendants retort that she failed to identify anything on the stairs that caused her to fall. See Benowitz Memorandum of Law at p. 19.

Proximate cause is an act or omission that is regarded as a cause of injury if it was a substantial factor in bringing about the injury. See PJI 2:70. Moreover, a plaintiff has to show proof of facts and conditions from which a defendant's negligence, and the causation of the accident by that defendant's negligence, can be inferred. *Ingersoll v. Liberty Bank of Buffalo*, 278 NY 1, 7 (App Ct 1938). Such proof of a finding of proximate cause must be grounded on logical inferences from the evidence, and not grounded on speculation. *Schneider v. Kings Hwy Hosp Ctr Inc.*, 67 NY2d 743, 745 (App Ct 1986).

Here, Ms. Vinasco was walking down the left side of the lobby stairs, using the handrail as a guide. She was not impaired in any way prior to the slip and fall. Nor was she using her mobile or carrying anything in her hands. She simply lost her footing when she placed her right foot onto the fourth step of the staircase. When that happened, she held onto the handrail "even stronger and when I slipped, it pulled out of place . . . and I lost my balance and fell." See Vinasco Tr. at p. 23, lines 9-14 & 18-25. Furthermore, Mr. Ettari, Defendant's expert, attested that Ms. Vinasco's contention about the steps being slick is unfounded because based on his assessment, the tread's co-efficient of friction was between .75 and .85.[4] See September 2, 2014 Ettari Aff. at ¶¶ 66-67.

[4] According to Mr. Ettari's findings and professional sources, a tread's co-efficient of friction of .3 is acceptable for walking surfaces. See September 2, 2014 Ettari Aff. at ¶ 68.

Nevertheless, it is reasonable to infer that but for the tenuous anchor of the subject handrail, Ms. Vinasco would not have been injured. Accordingly, the loosely screwed handrail was the proximate cause of the accident. As discussed *infra*, the two experts' opinions differed with respect to what constitutes a safe handrail in the context of building codes.

B. Battle of the Experts: Mssrs. Schwartzberg and Ettari[5]

While Ms. Vinasco's attorney asserts that Defendants breached their duty by violating several code sections,[6] according to Mr. Ettari, Defendants' expert, none of the cited codes pertains to the subject building. Defendants therefore retort that they cannot be liable. See Benowitz Memorandum of Law at p. 21. Whether building code provisions apply to a structure is an issue that the court should determine because it is a statutory one. *Lopez v. Chan*, 102 AD3d 625, 626 (App Div, 1st Dept 2013).

The relied-upon codes include the following: [1] the 1968 NYC Building Code [a/k/a the Administrative Code of the City of New York]; [2] the 1984 Uniform Fire Prevention Building Code; [3] the New York State Building Code; [4] the New York State Property Maintenance Code; and [5] Multiple Dwelling Law. As Defendants posit, and as this Court agrees, because the subject building was erected in 1912, the five aforementioned codes do not apply. See September 2, 2014 Ettari Aff. at pp. 6-7. Instead, 915 Kelly Street is subject to the standards/requirements of the Tenement House Law, which Mr. Ettari attests to the building's conformity. Id. at ¶ 22.

In contrast, Mr. Schwartzberg, Ms. Vinasco's expert, argues that it was inappropriate for the subject handrail to have only one bolt [or lag screw] at the top flange, and only one lag screw at the bottom flange because it is contrary to good and accepted practices for handrails used in locations where there is high pedestrian traffic. See Benowitz Aff. at Exh. N, ¶¶ 11-16; see also Kuriloff Opp. at ¶¶ 8, 10. In conjunction with Mr. Schwartzberg's expert assessment, it is apparent to anyone that the purpose and

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[5] Plaintiff's engineer expert, Mr. Schwartzberg, completed his assessment on December 11, 2010. Defendants' engineer expert, Mr. Ettari, completed his first assessment in March 2014, and the second one on January 18, 2015.

[6] See Benowitz Aff. at Exh. N.

function of a handrail is not decorative, but rather, it is there to aid and assist those in need of going up and down a staircase or ramp.

Thus, while this Court is mollified by Defendants' argument that none of the building codes applies to the subject building, there is still a duty owed by Defendants to maintain a reliable handrail that does not "give out," especially a handrail that is found at the entrance/exit of a residential building, because they own and control the subject stairs. Under common law, an owner of real property has the duty to maintain the property in a reasonably safe condition. *Peralta v. Henriquez*, 100 NY2d 139, 143 (App Ct 2003); *Bolte v. City of New York*, 48 Misc3d 1208(A) at *4 (Sup Ct, Bronx Cty 2015).

As mentioned supra, the other handrail had vertical supports, which signals an open and obvious condition about both handrails. An open and obvious condition, however, does not negate a defendant's duty to maintain safe premises in a reasonably safe condition. *Westbrook v. WR Activities-Cabrera Markets*, 5 AD3d 69, 73 (App Div, 1st Dept 2004). Accordingly, given the self-notice that Defendants had about the subject handrail, coupled with the tenuous state that it was in, Defendants breached their duty owed to Ms. Vinasco.

Although Defendant/Movant included a supplemental affidavit from Mr. Ettari in its Reply to further expound its stance that the subject handrail was adequately fastened to the wall by the two lag screws [bolts], Defendant deviated from the purpose of a Reply, which is to address the opposition's arguments using evidentiary proof that has ***already*** been submitted. Here, Defendant submitted a second affidavit from Mr. Ettari who made another inspection, thereby depriving Ms. Vinasco from responding to that January 18, 2015 assessment. See *Ritt by Ritt v. Lenox Hill Hospital*, 582 NYS2d 712, 713-14 (App Div, 1st Dept 1992) (the function of a reply affidavit is to address arguments made in opposition, and not to allow the movant to introduce new arguments in support of the motion); *Migdol v. City of New York*, 737 NYS2d 78, 79 (App Div, 1st Dept 2002). Mr. Ettari's first affidavit, in contrast with Mr. Schwartzberg's assessments, already created genuine issues of fact; his second affidavit only reinforced this Court's finding that Defendants' summary judgment motion must be denied.

V. CONCLUSION

In sum, Defendants' summary judgment motion is **DENIED** because there are genuine issues of fact surrounding Defendants' negligence as being the proximate cause of Ms. Vinasco's slip and fall injuries. The experts' findings also generate genuine issues of fact regarding what constitutes a "safe handrail." One of the main functions of handrails is preventive: to aid those who may need to grasp something in the event of a fall. Such was not the case here.

The parties are set to appear before J.H.O. Paul Victor on December 15, 2015.

This constitutes the Decision and Order of this Court.

Dated: August 25, 2015
Bronx, NY

Hon. Fernando Tapia, J.S.C.