SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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YANIL JAVIER,

Plaintiff,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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Index Number: 154636/2013

Sequence Number: 003

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on defendant's motion, pursuant to CPLR 3211 and 3212, to dismiss plaintiff's complaint and for summary judgment, and plaintiff's cross-motion, pursuant to CPLR 3126, to strike defendant's answer, or, in the alternative, preclude defendant from presenting certain evidence at trial:

	Papers Numbered:
Notice of Motion - Affirmation - Affidavit - Exhibits	1
Notice of Cross-Motion + Affirmation in Opposition - Affidavit - Exhibits	2
Reply Affirmation to Cross-Motion - Exhibits	3
Reply Affirmation	4

Upon the foregoing papers, defendant's motion is denied, and plaintiff's cross-motion is denied.

Background

On or about June 6, 2012, plaintiff, Yanil Javier, allegedly sustained personal injuries when she tripped and fell on an exterior stairway ("the Stairway") that leads to and from the outdoor parking lot area at a senior citizens center located at 99 Fort Washington Avenue in Manhattan ("the Premises"), a multiple dwelling owned and operated by defendant, The New York City Housing Authority ("NYCHA").

On July 12, 2012, plaintiff served a Notice of Claim upon NYCHA. In the notice, plaintiff allegedly stated that she was caused to fall as a result of a defective platform located at the top of the Stairway. NYCHA failed to make an adjustment or payment to plaintiff within the 30 days it had to do so from the date the claim was presented to it for adjustment.

On September 19, 2012, NYCHA held a statutory 50-h hearing ("the Hearing"), at which plaintiff testified to, inter alia, the following facts about the accident: that she and her daughter arrived at the Premises to drop something off for her mother, Altagracia Cerda ("Mother"), who worked at the Premises as a "home health aide"; that when she reached the Stairway, she descended it, and even though she was holding onto the handrail, she was caused to fall due to a stair defect; that when she fell, she felt a piece of the step ("the Defect"), the size of a water bottle (approximately 8-10 inches long and 2-3 inches wide), break off under her foot, causing her to fall; that she did not see the Defect until after she fell; and that she had never used the Stairway prior to her accident.

On April 4, 2013, NYCHA held a statutory physical examination, after which plaintiff commenced this personal injury action on or about May 20, 2013. On June 17, 2013, NYCHA served its answer.

On January 16, 2015, plaintiff appeared for a deposition ("the Deposition"), whereat she testified, inter alia, that she was unable to meet up with her mother on the date of the accident, but instead had to leave her items with the Premises' front

desk, and that she described the Defect as "crumbles" or "little rocks" rather than a missing piece the size of a water bottle. Plaintiff was also shown photographs of the Stairway and asked to identify the location of her fall; the parties disagree as to whether her markings at the Deposition were consistent with those she made at the Hearing.

On March 4, 2015, Nelson Diaz, a superintendent employed by NYCHA to maintain and inspect the Premises, appeared for his deposition. Diaz testified that on the date of the accident, he was the one who responded to the scene. Diaz alleges he immediately inspected the Stairway and did not see any cracks or conditions he would consider defects. Diaz testified that he took pictures of the Stairway on the date thereof. It is undisputed that these photographs were never produced in discovery despite multiple demands and court orders. At his deposition, Diaz was also questioned about an April 27, 2012 inspection report ("Inspection Report") created by the Supervisor of Caretakers ("the Supervisor"), an employee who fills out inspection reports, which contained a "needs rep" notation in the "Ramps/Steps/Railings" section. Diaz explained that if the Supervisor notes on the Inspection Report that a repair was needed, a corresponding work order should exist. The parties disagree, as they do about the majority of Diaz's deposition, as to what the lack of a corresponding work order demonstrates. Is it, as plaintiff alleges, that the Supervisor noted a defect, which NYCHA subsequently neglected to repair (showing NYCHA had notice), or, as NYCHA alleges, was the repair, which was eventually made, simply not recorded in a formal work order?

According to plaintiff, Diaz testified, inter alia: that he began working at the Premises *after* the accident and then stated that he was unsure of when he worked there; that there was no set schedule for regular maintenance of the Stairway; that the Stairway was not cleaned every month; that he could not ascertain if there were any regular job duties for the Stairway or if anyone was responsible for inspecting it; that he was supposed to inspect the Stairway monthly but failed to do so due to his responsibilities at other locations; and that if an inspector observed a dangerous condition on the Stairway it *probably* would be reflected in a report, but he was unsure.

According to NYCHA, Diaz testified that he worked at the Premises at the time of the accident (from March 2012 until November 2012) and that during the 3-4 times a week he used the Stairway, he never noticed any defects. NYCHA also alleges that Diaz testified that the Supervisor inspected the Premises on a monthly basis, that he conducted three separate inspections himself, and that if a repair was needed on the Stairway, a work order *would* be created. Thereafter, Diaz was asked to review certain documents and photographs produced during the course of discovery, and he testified to the following facts, inter alia: that except for some painting, no work was performed on the Stairway during his tenure; that the Stairway's work orders for the two years prior to the date of the accident contained no notes for repair; that the Supervisor's logbook made no references to the Stairway; and that if a resident or staff member of the Premises made a complaint about the Stairway, a work order would have been generated, none of which were. Diaz further testified that other tenants told him that plaintiff was running after her daughter when her accident occurred. On March 27, 2015, Olga Lauriano, the president of the Premises's Tenant Association, testified that on the date of the accident, she saw plaintiff run out of the lobby after her daughter, heard her scream, and then found her on the Stairway.

Plaintiff filed a Note of Issue on January 7, 2016, signifying that disclosure apparently was complete.

The Instant Action

NYCHA now moves, pursuant to CPLR 3211 and 3212, to dismiss plaintiff's complaint and for summary judgment.

In opposition to NYCHA's motion for summary judgment, plaintiff submits the affidavits of the Mother and her sister, Anabel Javier ("Sister"). The Mother testified that after she became aware of plaintiff's accident, she went to the Stairway and saw the Defect. The Mother testified that she used the Stairway once or twice a month and had noticed the Defect there six months before the accident. The Sister testified that she also saw the Stairway on the date of the accident and noticed not only the Defect, but that the edges of it appeared dirty and worn, as if it had been there for sometime. NYCHA objects to the Mother and Sister's affidavits from being considered on this motion, as they were not formally exchanged as witnesses during discovery.

Plaintiff now cross-moves, pursuant to CPLR 3126, to strike NYCHA's answer, or, in the alternative, to preclude it from presenting certain evidence at trial and from arguing that the Stairway was not defective. Plaintiff argues that NYCHA should be precluded from using certain photographs, depicting a white cement material showing that the Stairway has

been repaired ("the Photos'), it submitted in opposition to plaintiff's cross-motion because NYCHA failed to exchange them during discovery, despite plaintiff's continued requests for them. Plaintiff alleges that the preliminary conference order dated August 6, 2014 directed the Photos to be exchanged, and that NYCHA failed to respond to plaintiff's June 9, 2014 and April 6, 2015 discovery demands, which included requests for the Photos. In opposition, NYCHA states that it was unable to produce the Photos until August 2016 because Diaz no longer had the Photos on his phone, and an initial and subsequent search yielded no results. NYCHA alleges that it was finally able to produce the Photos when, in a final attempt, it found them in an email attachment Diaz had forwarded to another employee.

Discussion

I. NYCHA's Motion for Summary Judgment is Denied

As a preliminary matter, plaintiff's request to have its reply affirmation, dated September 14, 2016, be considered part of the record, as NYCHA submitted new and previously undisclosed evidence (*i.e.* the Photos) in opposition to its cross-motion, is hereby granted. In the interest of reaching the merits of this case, the Court, in its discretion, finds that there is no prejudice to either party to consider all parties' new arguments to the Court on the merits. See Allstate Ins. Co. v Raguzin, 12 AD3d 468, 468 (2d Dept 2004) ("the Supreme Court providently exercised its discretion in considering the sur-reply letter that plaintiff's attorney submitted in response to a new issue raised in the defendant's reply papers"); see also Citimortgage, Inc. v Espinal, 134 AD3d 876, 880 (2d Dept 2015) ("the appellant raised the issue ... for the first time in her opposition papers, and the Supreme Court gave the appellant an opportunity to respond").

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

NYCHA has failed to establish entitlement to summary judgment against NYCHA. On the record before the Court, questions of fact exist as to, inter alia: (1) whether NYCHA had actual or constructive notice of the Defect; (2) what the Supervisor's inspection reports and the Premises's work orders actually demonstrate about whether NYCHA had notice of the Defect; (3) whether there is any evidence as to how long the Defect existed before plaintiff's accident; and (4) what Diaz's testimony demonstrates (*i.e.* Was Diaz working for NYCHA at the time of the accident? Was anyone responsible for regularly inspecting the Stairway? Did Diaz actually inspect the Stairway once a month?). See Quiles v Greene, 291 AD2d 345, 346 (1st Dept 2002) ("The conflicting versions provided by [plaintiff] and [defendant] reveal issues of disputed material fact"). These are issues of credibility and fact for the jury to decide, not ones that can be decided on a motion for summary judgment. See People v Stavris, 75 AD2d 507 (1st Dept 1980) ("the court should not have decided the question of consistency as a matter of law but should have passed it to the jury to decide, with a proper instruction, as an issue of fact bearing on credibility"); see also People v Olivera, 45 AD3d 154 (1st Dept 2007) ("It is for the jury to decide what weight is to be given to evidence and if reasonable questions are raised concerning the credibility of such evidence, the jury has it within its power to completely disregard that evidence in arriving at a verdict").

Additionally, NYCHA's request to preclude the Mother and Sister's affidavits from the Court's consideration is hereby denied. NYCHA had actual and/or constructive notice that the Mother was a notice witness, as plaintiff referenced at both the Hearing and the Deposition that her mother responded to the Stairway after her fall. Since there was no surprise to NYCHA that the Mother was present at the scene of the accident, there is no prejudice. See Palomo v 175th St. Realty Corp., 101 AD3d 579, 580 (1st Dept 2012) ("Defendants' claim that the affidavits of three notice witnesses should be disregarded because they were not timely disclosed is unpersuasive since one witness was a former employee of defendants, and the other two were identified by plaintiff or his mother in their deposition testimony"); see also O'Callaghan v Walsh, 211 AD2d 531, 531 (1st Dept 1995) ("The disclosure of Ms. Jacobi's identity, which took place three weeks into the trial, did not sufficiently prejudice the plaintiff so as to warrant the sanction of preclusion, as he had notice of this witness' identity for approximately two weeks before the issue arose at trial ... Absent any showing of prejudice ... [, it] was an abuse of the trial court's discretion to preclude it"). As for the Sister, it is undisputable that the

parties engaged in discovery for over a year, and NYCHA had ample opportunities to ask plaintiff about other possible witnesses. Moreover, there is no prejudice to NYCHA for the Court to consider the affidavits. Neither affidavit is sufficient to defeat NYCHA's summary judgment motion, as they both only state a general awareness of the Defect without any indication that they made a formal complaint to NYCHA about it. See Isaac v 1515 Macombs, LLC, 84 AD3d 457, 459 (1st Dept 2011) ("Nor is actual or constructive notice established ... While plaintiff's son submitted an affidavit generally averring that misleveling was a well-known problem in the building, he admittedly did not complain about the alleged condition to defendants").

Accordingly, NYCHA's motion for summary judgment is hereby denied.

II. Plaintiff's Cross-Motion to Strike or Preclude is Denied

Pursuant to CPLR 3126, this Court can, in its discretion, strike a party's pleadings for failure to comply with discovery. However, in order to be entitled to the drastic relief of striking a defendant's answer or preclude it from offering evidence at trial, the movant must conclusively demonstrate that the non-compliant party's failure to comply with discovery demands was willful and contumacious. The burden then shifts to the non-compliant party to demonstrate a reasonable excuse for the noncompliance. See Reidel v Ryder TRS, Inc., 13 AD3d 170, 171 (1st Dept 2004) ("A court may [dismiss an action] only when the moving party establishes a clear showing that the failure to comply is willful, contumacious or in bad faith). The burden then shifts to the nonmoving party to demonstrate a reasonable excuse") (internal quotations omitted). Although the Court has the discretion to determine the nature and degree of the penalty to impose for failure to comply with discovery orders, it is well-settled that penalizing a noncompliant party by dismissing its action is drastic, and should only be levied in extreme circumstances. See generally Stathoudakes v Kelmar Contr. Corp., 147 AD2d 690 (2d Dept 1989) (noncompliant party's counsel "should be afforded another chance to provide the requested documentary information or, if they cannot, to supply a satisfactory explanation of their efforts to obtain that information").

Here, there is insufficient evidence to demonstrate that NYCHA's failure to serve the Photos before discovery ended was "willful and contumacious" because there is no proof that NYCHA intentionally destroyed or hid the Photos; rather, NYCHA's moving papers allege that it made repeated, diligent efforts to obtain them. See Catarine v Beth Israel Med. Ctr., 290 Ad2d 213, 215 (1st Dept 2002) ("even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits ... Defendants having set forth both a reasonable excuse for its failure to comply with the court's order and a meritorious defense to the action against it, Supreme Court improvidently exercised its discretion in striking the answer"). In any event, plaintiff now has the Photos and cannot claim surprise or prejudice at trial. See Pennachio v Costco Wholsale Corp., 119 AD3d 662, 664 (2d Dept 2014) ("the Supreme Court did not err in considering the [evidence] submitted by the plaintiff ... since the defendant had an opportunity to respond").

Accordingly, plaintiff's cross-motion to strike NYCHA's answer or preclude it from presenting certain evidence at trial is hereby denied, without prejudice to plaintiff making a motion in limine or objecting at trial to the introduction of the Photos.

Conclusion

Defendant's motion for summary judgment is hereby denied. Plaintiff's cross-motion to strike defendant's answer or preclude it from presenting certain evidence at trial is hereby denied without prejudice.

Dated: April 18, 2017

Arthur F. Engoron, J.S.C.