Morell v New York City Hous. Auth.
2017 NY Slip Op 31897(U)
September 7, 2017
Supreme Court, New York County
Docket Number: 154386/2015
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

DOMMINICE MORELL,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

INDEX NO. 154386/2015

MOTION DATE 08/22/17

MOTION SEQ. NO. 001

The following papers, numbered 18-53, were read on this motion for summary judgment.

Notice of Motion—Affirmation—Memorandum of Law—Exhibits A-L; Revised Affirmation in Support—Revised Memorandum in Support	No(s). 18-32; 45; 50
Affirmation in Opposition—Exhibits A-D—Affirmation of Service; Revised Affirmation in Opposition—Revised Memorandum in Support	No(s). 36-41; 48-49
Revised Reply Affirmation—Revised Reply Memorandum	No(s). 52-53

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Motion by Defendant New York City Housing Authority for summary judgment, pursuant to CPLR 3212, dismissing the instant action is denied.

BACKGROUND

Plaintiff alleges that at around 9:30 p.m. on October 27, 2014, she was injured when a window in her master bedroom fell onto her finger, causing the amputation of her left ring-fingertip. (Filiberti Affirm., Ex. A [Bill of Particulars] ¶¶ 1-3, 13.) In Plaintiff's Notice of Claim, Bill of Particulars and Supplemental Bill of Particulars, Plaintiff alleges that her injury occurred when the subject window "came off of its tracks" and landed on her hand. (Filiberti Affirm., Ex. A [Bill of Particulars] ¶ 2; Ex. B [Notice of Claim] ¶ 3; Ex. G [Supplemental Bill of Particulars] ¶ 2.)

During Plaintiff's 50-H Hearing, held on April 16, 2015, Plaintiff testified that on the night of her accident, her bedroom had two windows and that the accident occurred with the window on the right wall as you enter the room in the master bedroom. (Resnick Opp. Affirm, Ex. B [50-H Hearing Tr.] at 48:02-50:24.)

Plaintiff further testified that the subject window had a top pane that could be lowered and a bottom pane that could be raised. (*Id.*) Plaintiff testified that she lifted the bottom pane of the window on the right about an inch and that it immediately dropped down injuring her finger. (*Id.* at 52:19-55:03.) Plaintiff further testified that she used both of her hands to open the window, and that the window immediately fell on her left index and middle fingers with heavy impact, and that it did not appear to her that the window came off its tracks. (*Id.* at 55:11-58:21.)

At Plaintiff's deposition, held on February 29, 2016, Plaintiff testified that she was injured when attempting to open the window on the left wall of her master bedroom. (Filiberti Affirm., Ex. D [Morrell EBT] at 54:18-57:08.) Plaintiff testified that she lifted the window about three inches with her right hand and that it immediately fell down causing her injury. (*Id.* at 77:23-82:02.) Plaintiff testified that she did not remember the window becoming separated from its tracks during the accident. (*Id.* at 56:16-57:03.) Plaintiff testified that prior to the accident she had experienced "a lot of things wrong with the window[,]" including screws and "pieces" missing from the window. (*Id.* at 64:13-65:13.) Plaintiff states that prior to her accident, the subject window never dropped in the manner that it did on the date of her accident. (*Id.* at 65:14-66:08.)

Plaintiff further alleges that "I made numerous complaints to the New York City Housing Authority regarding the broken condition of the subject window prior to the happening of my accident." (Resnick Opp. Affirm., Ex. A [Morrell Aff.] ¶ 10; *see also* Ex. B [50-H Hearing Tr.] at 64:13-76:17 [stating that she started making complaints about the subject window as early as July 2013 and continued to do so telephonically, by going to the onsite management office, and by complaining directly to the superintendant but that no one from NYCHA ever came to her apartment to attempt to fix the allegedly broken window]; Ex. D [Morrell EBT] at 110:17-117:24 [stating that she began complaining roughly six months before the accident about the subject window being stiff to Defendant's personnel over the phone and in person and that Defendant's personnel never attempted to fix said window].)

Defendant moves for summary judgment on two grounds. First, Defendant argues that Plaintiff is unable to identify the cause of her injury and her inconsistent allegations as to which window caused her injury and how her injury occurred is based upon speculation. (Def. Memo. at 5-10.) Second, Defendant argues that it lacked notice of the alleged condition that caused Plaintiff's injury.

(*Id.* at 10-16.) Defendant argues that each ground provides a basis for the Court to dismiss the instant action.

In support of its arguments, Defendant submits an affidavit from Mark Marpet, a PhD and a PE in civil engineering. (Filiberti Affirm, Ex. J [Marpet Aff.] ¶¶ 2-6, Ex. A [Curriculum Vitae].) Marpet states that he reviewed Plaintiff's allegations and a photograph of the subject window—attached as Exhibit B[1] to his affidavit—and that he inspected "an exemplar window" during a site visit to Plaintiff's housing complex on March 13, 2017. (Marpet Aff. ¶7.) In reviewing the photograph of the subject window, Marpet identifies a "broken window balance" as "the gray metal channel on the inside of the window frame with a spring and a string attached to it." (*Id.* ¶ 13.) Marpet notes that this broken balance appears on the left side of the window frame and that there should be a balance on the right side of the window frame but that it is not shown in the photograph attached to his affidavit. (*Id.*) Marpet states however that, "It is my understanding that Plaintiff has not claimed that the window balance on the right side of the window frame was broken or missing." (*Id.*)

Marpet further stated that after testing the "exemplar window," he determined that "the only way that this window pane would not stay in the open position is if both of the window balances (the one on the left and the one on the right) were missing or broken." (*Id.* ¶ 16.) Marpet stated that if only one window balance were broken or missing, then "based upon my tests, the window would remain open, but in a lopsided position." (*Id.*) Marpet further adds that "even if Plaintiff did complain to NYCHA some time before the accident that the window at issue had missing or loose screws, it is impossible for the window to have fallen because of missing or loose screws." (*Id.* ¶ 18.) Marpet therefore concludes that "Plaintiffs assertions that (a) that the window suddenly fell out of its tracks or (b) that the window suddenly dropped down on her finger are completely without merit." (*Id.* ¶ 20.)

In addition, Defendant contends that if Plaintiff had a complaint about the subject window she would have called "a customer contact representative at the centralized call center located in Long Island City to notify NYCHA" and that this would in turn generate a work ticket. (Filiberti Affirm. ¶ 24 [citing Ex. H [Roache

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[1] This photograph attached to the Marpet Affidavit as Exhibit B was identified by Plaintiff, at her deposition, as depicting the right side of the window where her injury occurred. (Marpet Aff. ¶ 9; Morell EBT at 120:09-19.)

EBT] at 25:03-08, 26:18-27:15].) Defendant submits two of these alleged work tickets which appear to have been generated in response to calls by Plaintiff's brother Bernando Flowers on March 30, 2011. (Filiberti Affirm. ¶ 24; Ex. L [Work Tickets].) One ticket states the complaint as being that the window in the kitchen "will not stay up." (Work Tickets.) The other lists the complaint as being that the window in "Bedroom 01" "will not stay up." (*Id.*) Defendant asserts that the work tickets show that "[n]o complaints were made, nor work tickets generated for issues with the apartment's windows during the year before the alleged accident and no issues with regard to the apartment windows were reported to NYCHA within the year before the accident." (Def. Memo. at 14.)

In opposition, Plaintiff argues that Defendant has failed to eliminate all material issues of fact, and Plaintiff argues that her moving papers highlight that there are issues of fact and credibility regarding the mechanism of the accident and notice to Defendant.

In addition, Plaintiff submits an affidavit with her opposition seeking to clarify her statements regarding the nature of her accident. (Resnick Opp. Affirm., Ex. A [Morell Aff.].) In said affidavit, Plaintiff states that "[t]he window which fell on my hand was the right window in the unit that is situated on the wall immediately to the right of the entrance to my bedroom, from the perspective of someone entering the bedroom, however, on the left wall from my usual perspective." (Morell Aff. ¶ 7.) Plaintiff further stated:

> "The discrepancies in my testimony stem from my confusion regarding whether 'right window' or 'left window' was meant in the context of the window unit or the wall in which it was situated, confusion due to my usual perspective being from inside my bedroom looking out, rather than outside the bedroom looking in and difficulty I experience distinguishing between my right and my left."

(*Id.* ¶ 6.) Plaintiff further noted that, notwithstanding said confusion, she was shown different pictures of the same window which caused her accident, and she identified said window without any difficulty. (*Id.* ¶ 8.)

In addition, Plaintiff stated that "while I testified that I did not see the window come off its tracks while I was raising it, it did appear to come of[f] the track in its frame at the time it fell." (*Id.* ¶ 9.) Plaintiff added that she is "not able to distinguish window components such as frames, tracks, balances or any other

parts that comprise either a window or the mechanisms that allow windows to function properly." (*Id.* ¶ 12.)

Finally, Plaintiff asserts that Defendant's motion must be denied based on the doctrine of res ipsa loquitur because "common experience indicates that once a window is raised to an open position, it will not immediately slam down in the absence of the negligence" and because Plaintiff asserts that there is no evidence of contributory negligence on her own part. (Opp. Memo. ¶ 33.)

In reply, Defendant argues that Plaintiff's affidavit is a "self-serving and contradicting affidavit in an attempt to create a feigned issue of fact . . . ." (Reply Memo. at 2.) Defendant argues that Plaintiff failed to clarify her testimony during and after her 50-H hearing and deposition, and that she should not be allowed to do so now. (Reply Affirm. ¶ 18.) Defendant also argued that the theory of res ipsa loquitur did not apply because Defendant lacked exclusive control of the subject window—since it was located inside Plaintiff's apartment where she lived with others—and because Plaintiff was attempting to raise a new theory of liability not articulated in her notice of claim. (Reply Memo. at 5-7.)

The parties appeared for oral arguments on July 13, 2017, and, in sum and substance, largely reiterated the arguments made on paper. Plaintiff's counsel agreed that Plaintiff did give inconsistent testimony about which window fell on her finger, but argued that "a lack of knowledge of left from right is not a bar to recovery" and that the inconsistent testimony went to a credibility issue for the jury. (Oral Arg. Tr. at 15:06-16:08.) Plaintiff's counsel also stated that the discrepancy between Defendant's records which locate the last complaint about windows in Plaintiff's apartment as being around March 2011 and Plaintiff's assertion that she complained about the subject window up to six months before the accident created a material dispute of fact to be resolved at trial. (Oral Arg. Tr. at 31:12-21.)

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his [or her] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor, and he [or she] must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

Based on the submitted papers and the oral arguments, the Court finds that Defendant has failed to meet its burden of making a prima facie showing that there are no triable issues of fact, and as such the instant motion for summary judgment is denied. Further, Plaintiff has established that there are issues of fact that require a trial.

I. There Is a Material Question of Fact as to Whether Defendant Had Actual Notice of the Subject Dangerous Condition.

To demonstrate entitlement to summary judgment in a premises liability case, a defendant landlord must establish that it neither created the dangerous condition nor had actual or constructive notice of the dangerous condition. (*Ross v Bretton Woods Home Owners Ass'n, Inc.*, 151 AD3d 774 [2d Dept 2017].)

In the instant case, Defendant submits its internal business records in support of its allegation that "[n]o complaints were made, nor work tickets generated for issues with the apartment's windows during the year before the alleged accident and no issues with regard to the apartment windows were reported to NYCHA within the year before the accident." (Def. Memo. at 14.) In response, Plaintiff submits her sworn testimony that she made "numerous complaints to the New York City Housing Authority regarding the broken condition of the subject window prior to the happening of my accident." (Resnick Opp. Affirm., Ex. A [Morrell Aff.] ¶ 10; *see also* Ex. B [50-H Hearing Tr.] at 64:13-76:17 [same]; Ex. D [Morrell EBT] at 110:17-117:24 [same].) That Defendant merely asserts that it has no recent records of Plaintiff's complaints about the subject window does not negate, as a matter of law, Plaintiff's assertions that she repeatedly complained to Defendant about the subject window in the months preceding the accident. (*Stowe v Furness*, 150 AD3d 1654 [4th Dept 2017] [finding triable issue of fact where affidavit of prior tenant and deposition testimony of plaintiff's husband

contradicted defendant landlord's claim that it lacked actual notice of condition].) Rather, the evidence produced by each side creates a triable question of fact as to whether Defendant had actual notice of the dangerous condition prior to the accident. (*See Clindinin v New York City Hous. Auth.*, 117 AD3d 628, 628 [1st Dept 2014].)

Moreover, that Plaintiff appears to have given inconsistent testimony in describing the location of the window inside of her bedroom at her deposition and 50-H does not require this Court to find, as a matter of law, that Plaintiff's alleged complaints were insufficient to provide actual notice to Defendant. (*See Clindinin*, 117 AD3d at 629.) This again presents a question of fact to be addressed at trial.

II. Defendant Has Failed to Show, as a Matter of Law, That Plaintiff's Claim Is Based on Sheer Speculation.

"Although proximate cause can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the injury, mere speculation as to the cause of [an accident], where there can be many causes, is fatal to a cause of action." (*Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435 [2d Dept 2006] [internal quotation marks and emendation omitted].) "While plaintiff's evidence need not positively exclude every possible cause of [the accident] other than the alleged [] defects, it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation." (*Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006].)

Here, Plaintiff has stated that the subject window fell on her hand after she attempted to open it and that she had long experienced a multitude of problems with the subject window including it being stiff and having trouble staying up. She further testified that she repeatedly complained to Defendant about said problems and that Defendant never attempted to remedy them. There is nothing speculative about this theory of negligence. Unlike the various trip and fall cases where the plaintiff does not know what caused his injury (*see* Def. Mem. at 6), the instant Plaintiff has stated that the falling window caused her injury. As to any discrepancies in Plaintiff's testimony, it will be the fact finder to evaluate her credibility.

Defendant's submission of an affidavit from Marpet does not rule out Plaintiff's theory of negligence. Marpet argues that the accident could not have occurred in the manner that Plaintiff describes because "the only way that this

window pane would not stay in the open position is if both of the window balances (the one on the left and the one on the right) were missing or broken." (Marptet Aff. ¶ 16.) However, Marpet admits that he never inspected the subject window and, moreover, that his only knowledge of the subject window comes from a photograph that only shows one of the balances. Marpet's conclusion that only one of the balances was broken is based on his "understanding that Plaintiff has not claimed that the window balance on the right side of the window frame was broken or missing." (*Id.* ¶ 13.)[2] The Court finds that Marpet's conclusion that the subject window could not have suddenly fallen down is speculative at best, and does not rule out Plaintiff's version of the accident.

In addition, Plaintiff's affidavit does not present a feigned issue of fact. As a general rule, a court may reject affidavit testimony as presenting only a "feigned issue of fact" where said affidavit contradicts the affiant's prior deposition testimony and offers no explanation for the disparity. (*Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007] [cited in Reply Memo. at 2].) Here, however Plaintiff has explained the discrepancy in her testimony by stating that it stemmed from her confusion about what her perspective was in the room as it related to the questions posed to her as well as a general difficulty that she experiences in distinguishing right from left. (Morrell Aff. ¶ 6.) Likewise, Plaintiff has also explained that she was confused by the question about the point in time that she noticed the window had come off its tracks and that she lacks the lexicon of terms for various window components of which Marpet makes facile use. (*Id.* ¶ 12.) As such, this Court does not find that Plaintiff's affidavit amounts to a feigned issue of fact, and it is for the fact finder to determine Plaintiff's credibility.

Having found that Defendant has failed to meet its prima facie burden on the instant motion and further finding that there are triable issues of fact, this Court need not address Plaintiff's assertion of the doctrine of res ipsa loquitur.

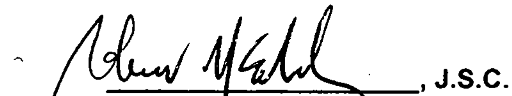
[2] Defendant also does not contend that Plaintiff prevented it from conducting a site inspection of the subject window.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant New York City Housing Authority's instant motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.



Dated: September 7, 2017
New York, New York

, J.S.C.
HON. ROBERT D. KALISH

1. Check one:.................................. ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:......... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:...................... ☐ SETTLE ORDER ☐ SUBMIT ORDER
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