Johnson v New York City Hous. Auth.
2017 NY Slip Op 33329(U)
December 4, 2017
Supreme Court, Kings County
Docket Number: 500463/2015
Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 97
Justice

JOANN JOHNSON,

Plaintiff,

INDEX NO. 500463/2015

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

The following papers were read on this motion by defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

This is a personal injury action commenced by Joann Johnson (plaintiff) to recover monetary damages for injuries allegedly sustained on December 21, 2013 when she slipped/tripped and fell near the bottom of staircase B between the third and second floor landing of a residential building located at 2295 West 11 Street Brooklyn, New York (Malboro Houses). At the time of the accident, plaintiff avers that the Malboro Houses were owned, maintained, and operated by the defendant New York City Housing Authority (defendant). Plaintiff commenced this action on January 14, 2015 via Summons and Verified Complaint. Issue has been joined, discovery is complete and Note of Issue has been filed. Before the Court is a motion by the defendant for an order, pursuant to CPLR 3212, granting summary judgment dismissing the Complaint. Plaintiff is in opposition to the motion and defendant

submits a reply.

In support of its motion, defendant submits, *inter alia*, a memorandum of law; a copy of the pleadings; plaintiff's deposition transcript; plaintiff's 50-h hearing transcript; the deposition transcript of defendant via Jamillah Stokes (Stokes), caretaker J at Marlboro Houses; the affidavit of Jose Alvarez (Alvarez), Superintendent of Marlboro Houses; and the affidavit of Delano Browne, the worker who performed a site inspection in May 2014 of the stairway where plaintiff's accident occurred. Defendant maintains that its motion for summary judgment must be granted as plaintiff cannot identify the source of her fall. It is defendant's contention that at her EBT, plaintiff testified that her foot slipped off the step, but she did not know what caused the slip. Defendant also states that there is no evidence of any defect in the subject stairs or lighting at the alleged location, and relies upon the affidavit of Alvarez who averred that a search of defendant's system revealed no reported complaints or repair work tickets with regards to any lighting issues or step defects at the alleged stairway location.

In opposition, plaintiff submits, *inter alia*, an affirmation of counsel; the affidavit of Danashia Sweeney (Sweeney), plaintiff's niece who assisted her after the accident, wherein she avers that plaintiff pointed out the broken step that caused her fall, and that she personally knows the chunk in the steps has been missing since at least 2011; and pictures of the alleged stairs where plaintiff slipped/tripped. Moreover, plaintiff relies upon and references the EBT and hearing testimony attached to defendant's papers. Plaintiff asserts that defendant's motion should be denied as plaintiff adequately identified the broken step as the cause of her fall, notwithstanding that it may seem otherwise from isolated portions of her EBT. Moreover, plaintiff maintains that the evidence submitted by defendant fails to eliminate triable issues of fact regarding notice.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of

fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "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]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

"A landowner has a duty to maintain its premises in a reasonably safe condition" (*Van*

Dina v St. Francis Hosp., Roslyn, N.Y., 45 AD3d 673, 674 [2d Dept 2007]; *see Basso v Miller*, 40 NY2d 233, 241 [1976]). "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Payen v Western Beef Supermarket*, 106 AD3d 710, 710 [2d Dept 2013]; *see Van Dina*, 45 AD3d at 674; *Maus v Hannaford Bros. Co.*, 105 AD3d 1015 [2d Dept 2013]; *Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880 [2d Dept 2012]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). "Only after the movant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition" (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598 [2d Dept 2008]).

"'A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected'" (*Farren v Board of Educ. of City of N.Y.*, 119 AD3d 518, 519 [2d Dept 2014], quoting *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034, 1035 [2d Dept 2010]). "To meet its burden on the issue of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (*Giantomaso v T. Weiss Realty Corp.*, 142 AD3d 950, 951 [2d Dept 2016]; *see Schwartz v Gold Coast Rest. Corp.,* 139 AD3d 696 [2d Dept 2016]; *Birnbaum*, 57 AD3d at 598-599). "[R]eference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question" (*Schwartz*, 139 AD3d at 697 [internal quotation marks omitted]; *Giantomaso*, 142 AD3d at 951).

"In a premises liability case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Steed v MVA Enterprises, LLC*,

136 AD3d 793, 794 [2d Dept 2016]; *see Deputron v A & J Tours, Inc.*, 106 AD3d 944 [2d Dept 2013]; *O'Connor v Metro Mgt. Dev., Inc.*, 130 AD3d 698 [2d Dept 2015]; *Defino v Interlaken Owners, Inc.*, 125 AD3d 717 [2d Dept 2015]; *Trapani v Yonkers Racing Corp.*, 124 AD3d 628 [2d Dept 2015]). "Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any determination by the trier of fact as to causation would be based upon sheer conjecture" (*Deputron*, 106 AD3d at 945, quoting *Dennis v Lakhani*, 102 AD3d 651, 652 [2d Dept 2013]). "That does not mean that a plaintiff must have personal knowledge of the cause of his or her fall. Rather, it means only that a plaintiff's inability to establish the cause of his or [her] fall - whether by personal knowledge or by other admissible proof - is fatal to a cause of action based on negligence" (*Pol v Gjonbalaj*, 125 AD3d 955, 955-956 [2d Dept 2015], quoting *Izaguirre v New York City Tr. Auth.*, 106 AD3d 878, 878 [2d Dept 2013]).

Here, viewing the evidence in the light most favorable to the plaintiff as the non-movant, the Court finds that defendant fails to establish, prima facie, that the plaintiff is unable to identify the cause of her fall down the stairs (*see Shajahan v Bokari*, 74 AD3d 1174 [2d Dept 2010]; *Lamour v Decimus*, 118 AD3d 851 [2d Dept 2014]; *Morales v New York City Hous. Auth.*, 125 AD3d 619 [2d Dept 2015]; *Buitrago v Gutman Mgt. Co., Inc.*, 133 AD3d 698, 699 [2d Dept 2015] ["On February 1, 2010, the plaintiff allegedly slipped and fell on a puddle of water near a planter in the hallway of a building owned by the defendant...viewing the evidence in the light most favorable to the plaintiff, the defendants failed to establish, prima facie, that the plaintiff was unable to identify what had caused her to fall"]; *Belton v Gemstone HQ Realty Assoc., LLC*, 115 AD3d 840 [2d Dept 2016]; *cf. Davis v Rochdale Vil., Inc.*, 63 AD3d 870 [2d Dept 2009]). In support of its motion, defendant submitted the transcript of plaintiff's 50-h hearing which took place on October 10, 2014, at which she testified that her foot slipped on the stairs, and even though she answered that she did not know what caused her fall, she also answered that her

foot slipped because "the stair was broke. It was a piece broke off the stair" (*see* Defendant's exhibit E, pg. 67). Contrary to the defendant's contention, this testimony is sufficient to establish that plaintiff was aware of the condition that caused her to fall (*see Shajahan*, 74 AD3d at 1174; *Baldasano v Long Is. Univ.*, 143 AD3d 933 [2d Dept 2016]), even when taking into account the testimony that plaintiff did not see what caused her to fall as her foot slipped off the stairs.

The Court also finds that defendant has failed to satisfy its initial burden to demonstrate that it lacked constructive notice of any defective condition on the steps (*see Birnbaum*, 57 AD3d at 599; *Korn v Parkside Harbors Apartments, LLC*, 134 AD3d 769 [2d Dept 2015]; *Maus*, 105 AD3d at 1016; *Williams v New York City Hous. Auth.*, 119 AD3d 857 [2d Dept 2014]). Specifically, defendant failed to submit any evidence as to when staircase B was last inspected or the condition of said staircase prior to plaintiff's accident on December 21, 2013 (*see Korn*, 134 AD3d at 770; *Van Dina*, 45 AD3d at 674; *Giantomaso*, 142 AD3d at 951). The testimony of Stokes, who was employed as the caretaker for Marlboro Houses at the time the accident occurred, as to the procedures regarding maintenance of the building was extremely general and offered no particular information as to when staircase B was last seen on the date of plaintiff's accident. Specifically, Stokes testified that she could not recall how many times she went up and down the specific section of the staircase in question that weekend, but estimates it to be once on the day of the accident, and maybe three times that entire weekend (*see* Defendant's exhibit G, pg. 43). Since defendant did not submit specific evidence as to when the staircase in question was last inspected prior to the plaintiff's accident, summary judgment must be denied (*see Bruk v Razag, Inc.*, 60 AD3d 715 [2d Dept 2009]). Additionally, the Court notes that defendant's reliance on Alvarez's affidavit, who avers that a search of defendant's Maximo system revealed no reported complaints or repair work tickets with regards to any lighting issues or step defects at the alleged stairway location, is misplaced as it still fails to

eliminate all triable issues of fact regarding defendant's notice of any alleged defect in lighting and the stair's condition.

As the defendant failed to demonstrate its prima facie entitlement to judgment as a matter of law, this Court need not review the sufficiency of the plaintiff's opposition papers (*see Bergin v Golshani*, 130 AD3d 767 [2d Dept 2015]; *Giantomaso*, 142 AD3d at 951; *Santos,* 89 AD3d at 830; *Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011]). However, even assuming *arguendo* that this Court were to find that defendant demonstrated lack of notice, the Court finds that plaintiff raises triable issues of fact in opposition given the submission of Sweeney's non-party affidavit wherein she avers, *inter alia*, that she made complaints to defendant about the broken condition, to wit, chunks missing of the stairs since at least 2011.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant the New York City Housing Authority's motion, pursuant to CPLR 3212, seeking summary judgment dismissing the complaint is denied; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendant.

This constitutes the Decision and Order of the Court.

2017 DEC 18 AM 8:30
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Dated: 12/4/17

PAUL WOOTEN *J.S.C.*