Katz v 260 Park Ave. S. Condominium Assoc.
2018 NY Slip Op 30088(U)
January 16, 2018
Supreme Court, New York County
Docket Number: 155146/2013
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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COHL KATZ,

Plaintiff,

- against -

260 PARK AVENUE SOUTH CONDOMINIUM ASSOCIATES, 260 PARK AVENUE SOUTH CONDOMINIUM OWNERS CORP. and MAXWELL KATES BROKERAGE,

Defendants.

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DECISION AND ORDER

Index No. 155146/2013
Mot. Seq. 002

In this trip and fall case Defendants, 260 Park Ave. South Condominium Associates, 260 Park Avenue South Condominium Owners Corp., and Maxwell Kates Brokerage Inc. (collectively "Park Ave.") move for summary judgment dismissing the complaint filed by Plaintiff, Cohl Katz. The Plaintiff opposes this motion.

BACKGROUND

Plaintiff alleges that she sustained injuries on October 30, 2012 when she tripped going down the stairs while she was leaving her apartment at 260 Park Avenue South. The evening before, Hurricane Sandy hit New York City and many buildings lost power, including plaintiff's. Due to the power being out, Plaintiff used the stairwell instead of the elevator to exit the building. There were no lights illuminating the stairwell due to the outage. Plaintiff made her first trip down and up the stairwell without incident. When she arrived home to her apartment, she realized she did not have all the emergency supplies she needed and went back into the stairwell once more. She testified that when she entered the stairwell, she was holding onto the door and stepped down from the landing onto the first step. When she took her first step with her left foot, she fell.

Plaintiff testified she twisted her ankle on the stair due to a "hole" and she fell down the entire flight of stairs. After Plaintiff fell, she made her way down to the lobby. She saw her superintendent, James, in the lobby. A doorman helped her outside to the sidewalk. It is there that Plaintiff and the doorman saw an ambulance and the doorman assisted her to the ambulance. After the incident, the Plaintiff moved out of her apartment. She returned a few weeks later to examine the step and to photograph the step with her iPhone.

The Plaintiff filed a claim against the Defendants, arguing that as the landlord of the building, it breached its duty to maintain the demised premise in a safe manner. The Defendants, Park Avenue, moved for summary judgment dismissing the Plaintiff's complaint.

DISCUSSION

"[T]he 'proponent of a summary judgment motion must make some prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dep't 2010), quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the movant meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

The Defendants argue that they had no duty to illuminate the stairs during the Hurricane Sandy blackout and that the alleged defect is trivial.[1] The Court of Appeals has held that

[1] Defendants also argue that Plaintiff was intoxicated at the time of this accident, an allegation that Plaintiff denies. The issue of Plaintiff's alleged intoxication relates to the issue of

pursuant to Multiple Dwelling Law § 37(2), the building is relieved from liability if the light "becomes extinguished and remains so without the knowledge or consent of the owner." In *Viera v. Riverbay*, the First Department held that no absolute duty was owed by the owner to illuminate the stairway because the lights were rendered inoperable by the blackout. *Viera,* 44 A.D.3d 577 (1st Dep't 2007). In this case, Hurricane Sandy caused the blackout.

In *Magiapane v. Dalton Mgt. Co. LLC,* No. 157261/13, 2014 N.Y. Misc. LEXIS 3912 (NY Sup Ct. 2014), a plaintiff tripped and fell down a set of stairs that were not illuminated during Hurricane Sandy. The court granted summary judgment for defendant, based on the precedent set forth in *Viera* and *Kopachilis* that the defendant had no duty to provide light as the lack of lighting was out of defendant's control.

Accordingly, the only issue that needs to be considered in this case is the condition of the step and whether the condition of the step caused the Plaintiff's accident. The Court of Appeals has held that the defendant has the burden to make some prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79 (2015). Only then does the burden shift to the plaintiff to establish an issue of fact. *Hutchinson*, 26 N.Y.3d 66, 79 (2015).

In this case, the Defendant points to the dimensions of the defect in the step and compares them to the dimensions of a sidewalk in *Hutchinson*, and argues that the defect was trivial as a matter of law. Defendants further provide an expert affidavit from Bernard P. Lorenz,

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contributory negligence and not proximate cause under these circumstances. *See Brecht v. Copper Sands, Inc.*, 237 AD2d 907 (4th Dep't 1997).

P.E. to establish that the defect was trivial, it did not violate applicable code standards or ordinances, and the stairs were well-maintained and safe.

In opposition, Plaintiff argues that the defect is not trivial. In support of this argument, she cites *Zelichenko v. 301 Oriental Blvd., LLC.*, 117 A.D.3d 1038 (2014). In *Zelichenko*, the plaintiff was walking down a set of stairs when his foot "got caught" as he stepped on to the nosing.[2] The nosing was defective due to a chip or a missing piece. While the Second Department in *Zelichenko* granted the defendant's motion for summary judgment, the Court of Appeals in the *Hutchinson* case overturned this decision by stating:

> The step tread had a missing piece, of irregular shape, 3.25 inches in width and at least one-half inch in depth, on the nosing of the step, where a person might step, and the record contains an expert affidavit explaining the necessity for step treads to be of uniform horizontal depth. After examining all the pertinent facts and circumstances of this case, as we are required to, we conclude that a material triable issue of fact exists regarding whether the defect was trivial.

The Plaintiff alleges that the dimensions of the defect are: "9 inches along nosing", "4 ¾ inch in width", and the height difference is between "1/4 inch to 3/8 inch." (Aff. in Opp. at p. 9). The Plaintiff argues that as the dimensions of the defect in this case are even more severe than those in *Zelichenko*, this presents a triable issue of fact.

Further the Plaintiff submits an expert affidavit from Nicolas Bellizzi, P.E. Plaintiff's expert states that the step violated the Administrative Code §§ 28-301.2 and 27-375(e)(2) causing a dangerous and hazardous condition.

Here the evidence submitted by Plaintiff is sufficient to raise an issue of fact as to whether the condition of the step was the cause of Plaintiff's accident. Based on the information

[2] Nosing—a rounded edge of a step or molding

contained in the record and the arguments made by each party, Defendants' motion for summary judgment is denied.

CONCLUSION

Accordingly, it is hereby ORDERED that defendants motion for summary judgment is denied.

This constitutes the decision and order of the court.

Date: January 16, 2018

Kelly O'Neill Levy, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.