Seq 7

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

----------x

SESAME STANLEY,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY and ABC, CO. and ABC CO. INC, (fictitious defendants believed to have owned, leased, controlled, supervised, maintained, managed and/or repaired the subject premises, and window/wall thereon),

Defendant(s).

----------x

Index No. 500562/2012

DECISION

Present:
Hon. Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion: Defendant's Motion for Summary Judgment pursuant to CPLR sec. 3212:

Papers	Numbered
Notice of Motion, with Affidavits attached;	1-2
Plaintiff's Affirmation in Opposition to motion for summary judgment;	3
Reply Affirmation of Defendant;	4
Miscellaneous: Defendant's Memorandum of Law	5

Decision:

In this motion for summary judgment, the defendant, New York City Housing Authority ("NYCHA"), by its attorneys, has moved to dismiss plaintiff's complaint pursuant to CPLR §3212. The motion and supporting papers were filed on or about April 26, 2018.

Plaintiff, Sesame Stanley, by her attorneys, opposes this motion and argues that summary judgment is not appropriate in this matter. Opposition to this motion was submitted on or about April 26, 2018.

The instant motion was argued before the undersigned in Part 36 of this Court on June 7, 2018.

Background:

Sesame Stanley is the daughter of Melody Stanley, the tenant of record of apartment #2B at 184 Stagg Walk, Brooklyn, NY. Sesame Stanley did not live at 184 Stagg Walk at the time of the incident, but would go there to visit her mother, her sisters Syeidda and Martesse and their children, who all lived in #2B, along with Melody Stanley's friend Jamal Smith. The subject property is owned by the defendant NYCHA, is part of a housing complex referred to as the "Williamsburg

Houses," and consists of four floors, with four apartments on each floor (see D. Carmoega Dep., par. 12.).

On November 17, 2011, Sesame Stanley claims she went to 184 Stagg Walk, #2B to visit her family. While there, Sesame Stanley ate food, listened to music, and played cards. Sometime between midnight and 1:00 am, Sesame Stanley purportedly went to the back bedroom and turned the lights off to go to sleep. According to Ms. Stanley, the room was hot, she attempted to open the window, which seemed to be "stuck," and while trying to open the "stuck" window, Sesame Stanley lost her balance, slipped, and struck her head on the metal windowsill, rendering her unconscious. Sesame Stanley then fell to the floor, injuring her spine and incurring severe burns on her arm from prolonged contact with a heating pipe. The incident was not witnessed by anyone.

The window at issue had been repaired by NYCHA maintenance workers in May of 2010. Melody Stanley filed a complaint alleging the window "wouldn't stay up," – that it was too "loose" and needed to be "tightened" to protect her grandson, whose fingers were nearly injured when the window fell shut. When NYCHA serviced the window, the maintenance worker "tightened" it so it would stay up, and Melody Stanley stated she was satisfied with the repair (See M. Stanley Dep., pg. 65, 67). In April of 2011, the window was checked again by NYCHA maintenance. The record indicates that a prior inspection of the apartment took place in April 2011. The work appears to have been an inspection and "securing" of the window guards of the window at issue.

Sometime between July 3 and July 7, 2011, Messiah Wrighton, Sesame Stanley's boyfriend, wanted to put a fan in the window at issue (See M. Wrighton Dep., p. 71). Mr. Wrighton was staying with Sesame Stanley in the back bedroom during that time and the room was purportedly very hot. When Mr. Wrighton was unable to open the window, he went to the maintenance office at 176 Maujer Street with the intent to file a complaint regarding the "stuck" window on behalf of Melody Stanley. However, he was informed that Melody Stanley needed to call and confirm the complaint. No repairs were made on the window at issue, and the window remained "stuck" (See M. Wrighton Aff.). Sesame Stanley reported that she was unaware there was a problem with the window (See Sesame Stanley Dep., p. 49).

There had been other complaints regarding apartment #2B prior to the accident. In May of 2010, Melody Stanley filed a complaint for plastering, and filed another in February of 2011 for plastering. In April of 2011 a complaint was filed that the floor tiles were "DML" or "damaged, missing, or loose" (See C. Scott Dep., p. 15). When NYCHA maintenance workers arrived to repair the tiles, they reported "the tiles are okay", and the work ticket indicates that the workmen inspected the window guard and secured it (See work tickets annexed to defendant's amended motion for summary judgment as Ex. "A").

According to Mr. Wrighton's deposition, there is an established procedure for filing a complaint with the NYCHA maintenance office. (See M. Wrighton Dep., p. 72). To make a complaint, the tenant of record must go to the maintenance office and fill out a ticket. If the tenant of record is not the person making the complaint, the tenant of record must call the office to confirm the complaint. NYCHA does not dispute that this is the required procedure. If these steps are not followed, a valid complaint has not been filed.

A summons and complaint was served upon Defendant NYCHA on March 19, 2012. A verified answer was submitted by NYCHA on April 20, 2012. A bill of particulars was submitted

by Plaintiff's counsel on August 9, 2012, a supplemental bill of particulars was submitted on April 6, 2015, and a further response and supplement to bill of particulars was submitted on April 3, 2017.

This Court has previously denied the Defendant NYCHA's motion to dismiss in a decision dated February 8, 2018. The motion was denied without prejudice "to being refiled upon the completion of a deposition of Messiah Wright a fact witness in the event NYCHA chooses to do so." (See Decision of J. Graham dated Feb. 8, 2018). After deposing Mr. Wrighton, defense counsel filed a notice to renew the motion for summary judgment on April 26, 2018.

Issues Presented:

NYCHA (Defendant) argues that it had no actual or constructive notice of the "stuck" condition of the window. In addition, it is NYCHA's position that the affidavit and deposition provided by Mr. Wrighton regarding the condition of the window fails to establish notice because Mr. Wrighton was unauthorized to make a complaint on behalf of Melody Stanley to the NYCHA maintenance office, and as such, no notice was given.

NYCHA also claims that Sesame Stanley fails to identify the cause of her fall and, therefore, has not established the proximate cause of her injuries.

Opposing the motion, Sesame Stanley argues that NYCHA caused and created the "stuck" condition of the window when NYCHA maintenance personnel repaired the "loose" window by "tightening" it.

Defendant's Contentions:

In support of its motion, NYCHA provides evidence that the window in question was repaired in May of 2010 when Melody Stanley filed a complaint that it was too loose and might injure her grandson. While NYCHA does not dispute that maintenance workers did tighten the window, NYCHA contends that NYCHA maintenance workers made the repairs requested by Melody Stanley to make the window safe for her grandson, and Melody Stanley was satisfied with the result.

"In a slip-and-fall case, a plaintiff's inability to identify the cause of his or her 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." *Amico v. Kasneci*, 134 A.D.3d 696; 20 N.Y.S.3d 908 [2nd Dept. 2015], (see also *Barone v. Concert Service Specialists, Inc.*, 127 A.D.3d 1119, 8 N.Y.S.3d 358 [2nd Dept. 2015]). NYCHA argues that Sesame Stanley cannot show the proximate cause of her fall because she cannot identify what she slipped or fell on. Sesame Stanley's inability to identify precisely what caused her fall prevents her from being able to make out a prima facie case of negligence because she cannot say with certainty that the stuck window condition was the proximate cause of her injury. In addition to the lights being off in the bedroom when the incident occurred, Sesame Stanley responded "I don't know…" when asked what she fell on, and she acknowledges that she lost consciousness (See Sesame Stanley Dep., pg. 45).

Furthermore, NYCHA asserts that they had neither actual nor constructive notice of the stuck window condition because there was no formal complaint filed with the NYCHA maintenance office, and NYCHA had previously repaired the window in question to Melody Stanley's

satisfaction and was unaware there was a further issue with it. NYCHA asserts that Mr. Wrighton was informed on three separate occasions that NYCHA would not take his complaint about the window because he was not a tenant, and he was aware Melody Stanley would have to contact NYCHA herself. In addition, NYCHA submitted the sworn affidavit of Cory Scott, Assistant Superintendent of the Williamsburg Houses, in support of their motion. Cory Scott states he conducted a work ticket search for complaints about or repairs to the window from January 1, 2010 to November 17, 2011, all of which were included in Exhibit "A" of NYCHA's motion for summary judgment. The last complaint made about the window was in June of 2010, almost a year and a half before the incident, and there was no other complaint found which had been filed by Mr. Wrighton or Melody Stanley related to a stuck window.

Plaintiff's Contentions:

In opposition to NYCHA's motion for summary judgment, Sesame Stanley claims that the stuck window in the back bedroom of Melody Stanley's apartment is a dangerous condition and asserts that NYCHA created the stuck window condition by tightening the loose window. Sesame Stanley claims the stuck window caused her to fall because she lost her balance while struggling to lift it up. She leaned forward to raise the window, and as she was pushing, her arm, foot and ankle slipped, she hit her head on the metal windowsill, and she lost consciousness. (See Sesame Stanley Dep., par. 49-52).

Sesame Stanley claims that NYCHA had actual notice when Mr. Wrighton made the complaint on behalf of Melody Stanley at the maintenance office. In addition, NYCHA had constructive notice when the NYCHA maintenance workers lifted the stuck window to secure the window guard several months before the accident, because upon lifting the window, NYCHA maintenance workers would have noticed its stuck condition. Both Sesame Stanley and Mr. Wrighton provided affidavits supporting the contention that prior complaints had been made about the stuck window. Mr. Wrighton also stated in his deposition that he gave notice of the window condition several times prior to the accident. Plaintiff's counsel asserts that NYCHA's policy about complaints "does not cancel out notice" and that "actual notice was provided of the defect in advance of the accident and it does not matter by whom". (See Affirmation of Charles J. Gayner in Opposition to Motion for Summary Judgment, pars. 6, 27)

Sesame Stanley also asserts that there are complaints missing from NYCHA's file, and that, although many are not relevant to the window at issue, the larger issue is that the file itself is incomplete. (See Sesame Stanley Aff., and M. Wrighton Aff.) The relevant missing document is the index card that Mr. Wrighton claims he filled out in the NYCHA maintenance office (See M. Wrighton Dep. par. 73-74). Plaintiff's counsel claims that, by giving Mr. Wrighton the index card, the woman who worked in the maintenance office contradicted NYCHA policy, and that failure to adhere to the policy should therefore not be dispositive of actual notice.

Discussion:

For a premises liability cause of action, the plaintiff must establish negligence by demonstrating that the existence of a dangerous or defective condition caused his or her injuries, and the defendant created, or had actual or constructive notice, of the condition. *Robert v. Mahopac School Dist.*, 38 A.D.3d 514, 515; 831 N.Y.S.2d 492 [2nd Dept., 2007].

For a case involving an alleged negligent repair, "…the only theory on which there can be liability [for the landlord] is that, having volunteered to make the repair, he was negligent with respect to the repairs he attempted to make, and increased the danger, and that the damages were the direct result of his acts." *Marston v. Frisbie*, 168 A.D. 666, 670 [1st Dept., 1915]. It is undisputed that NYCHA maintenance workers repaired the "loose" window and made it "tighter", and that this repair created the "stuck" window condition. However, the condition created by the property owner must be "dangerous," and the repair must have either failed to make the condition safer or made the condition even more dangerous. *Marks v. Nambil Realty Co., Inc.,* 245 N.Y.256, 258 [1927]; see also *Robert v. Mahopac School Dist.*, 38 A.D.3d 514 [2nd Dept., 2007]; *Marston v. Frisbie*, 168 A.D. 666 [1st Dept., 1915]; *Tucker v. Wagner*, 132 Misc. 402 [1928].

A window that was not moving freely is not necessarily a dangerous condition. It has been found in an analogous case that a smooth floor was found not to create liability for a slip-and-fall simply because it was smooth. *Silver v. Brodsky*, 112 A.D.2d 213, 214 [2nd Dept., 1985]. Here, the condition of the "stuck" window posed no inherent danger. In fact, the window was a "dangerous" condition *before* the repair in May of 2010, when the window was "tightened," as per Melody Stanley's request, to prevent it from falling on Melody Stanley's grandson's fingers. In *Marks v. Nambil Realty Co., Inc.*, the court held that because the repair "cloaked the defect" of the step that had subsequently collapsed, the repair aggravated the danger under the *Marston* rule and the party that made the repair was liable. Id at 259. In this case, although the window was slightly more difficult to open as a result, the repair fixed the previously unsafe window condition to ensure the window would not cause injury by suddenly falling shut. Furthermore, Melody Stanley stated that she was satisfied with the repairs made to the window, was aware of the tightened condition of the window, and no longer regarded the window as a "dangerous condition" (See Melody Stanley Dep., p. 65, 67). It is also part of the record that Melody Stanley was able to open and close the window at issue (See Melody Stanley Dep., p 66)

If the defendant did not create the dangerous condition, the defendant must have had actual or constructive notice of the condition to be held liable for negligence. A defendant may be charged with constructive notice of a dangerous or defective condition when the dangerous condition is "ongoing…[and] routinely left unaddressed." *Pfeuffer v. New York City Housing Authority*, 93 A.D.3d 470, 940 N.Y.S.2d 566 [1st Dept. 2012] (see also *DeJesus v. New York City Housing Authority*, 53 A.D.3d 410, 861 N.Y.S.2d 782 [2011]). Under the facts produced in this case the Court cannot deem the defendant NYCHA to have constructive notice of a dangerous condition based on the single, earlier repair in May of 2010, when the window was tightened. The mere fact of repairing the window as requested by the tenant of record (and to her satisfaction) would not impute constructive notice.

Here, plaintiff's counsel asserts that Mr. Wrighton's improperly filed complaint about the stuck window should be regarded as actual notice. To do so would imply that the NYCHA procedure for filing a maintenance complaint should simply be ignored. This is an unreasonable assertion. Mr. Wrighton was well aware that he was not following the proper procedure to make the complaint. (See M. Wrighton Dep., pg. 74). When he was instructed on how to follow the procedure, Messiah Wrighton handed Melody Stanley the index card, but has no knowledge of whether she made the phone call. The only conclusion that can be drawn from Mr. Wrighton's failure to properly file the complaint is that Mr. Wrighton did not intend to properly file the complaint. It is also important to note that Melody Stanley, as the tenant of record, also had no intention of filing a complaint about the stuck window and did not do so.

NYCHA offers work tickets that show the window was last inspected in April of 2011 at which time the floor tiles were checked and the window guard was secured, which involved lifting the window. Although Sesame Stanley claims that lifting the stuck window gave NYCHA constructive notice, the maintenance worker was able to lift the window and do the work, and nobody in the apartment complained about the window during that time. This was seven months before Sesame Stanley's injuries were sustained, and three months before Mr. Wrighton attempted to make a complaint to maintenance about the stuck window. Since no complaint was actually filed, there would be no record of it in NYCHA's file. Furthermore, there is no spoliation issue with regard to the index card Mr. Wrighton claims he filled out, because there is no proof that it was given to NYCHA or retained by NYCHA.

Conclusion:

To succeed on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986].

It is this Court's opinion that Defendant NYCHA has made a sufficient showing of evidentiary proof that there are no genuine issues of material fact regarding Sesame Stanley's negligence claim against NYCHA that will require a trial of the action. In response, Plaintiff Sesame Stanley has failed to offer admissible evidence indicating the existence of a question of fact. Accordingly, summary judgment is granted to the Defendant NYCHA.

This shall constitute the decision and order of this Court.

Dated: July 16, 2018

ENTER:

Bernard J. Graham, JSC

KINGS COUNTY CLERK
FILED
2018 JUL 23 AM 8:00