Saldana v City of New York
2018 NY Slip Op 32973(U)
October 1, 2018
Supreme Court, Bronx County
Docket Number: 21703/2015
Judge: Llinet M. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 25

ERIKA SALDANA,
Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY and NEW YORK CITY DEPARTMENT OF HOUSING, PRESERVATION and DEVELOPMENT,
Defendant.

INDEX NUMBER:21703/2015

Present:
HON. **LLINÉT M. ROSADO**

Defendant NEW YORK CITY HOUSING AUTHORITY (hereinafter "NYCHA") moves this Court for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint. Plaintiff opposes the motion and NYCHA submitted a reply.

The within action arises out of injuries sustained by the plaintiff on March 26, 2014 at 1060 Beach Avenue, Bronx, New York which is part of the Sotomayor Houses. Plaintiff alleges that on said date, at approximately 3:30pm, she entered the "B" stairwell and slipped and fell. In her Verified Bill of Particulars, plaintiff alleges that NYCHA was negligent in causing, allowing, and/or permitting dangerous and hazardous conditions and/or substances to be and remain in and about the location including debris, liquid and/or other slippery substances on and about the subject step causing her to slip and fall. Plaintiff also alleges NYCHA was negligent in failing to provide adequate lighting in the subject stairwell; proper and adequate handrails; violated Sections 1001.3 and 1006.2 of the 1968 New York City Building Code, Section 1027.3 of the New York City Fire code, and Sections 27-127 and 27-128 of the Administrative Code of the City of New York.

Defendant NYCHA moves for summary judgment on the grounds that NYCHA did not

create the alleged transient condition and did not have actual or constructive notice of it and that plaintiff's claim of inadequate lighting is disproved by her own testimony that the lights were on and working. In support of its motion, NYCHA submits, among other things, plaintiff's 50h and deposition transcripts, the deposition transcript of NYCHA's caretaker, Justin Nesmith (Nesmith), and a copy of the janitorial schedule for the subject building.

At his deposition, Nesmith testified that he was working on the date in question by himself in the subject building as caretaker (deposition of Mr. Nesmith at 8, 27, 30, 31). Nesmith testified that on March 26, 2014, he followed the janitorial schedule of sweeping and mopping the stairwell and conducted his second walkthrough after his break was over at 3:15. (id. at 8, 11, 15, 40). Further, he testified that he would mop up any spills he observed during said walkthrough (id. at 13, 20, 25, 39). Nesmith also testified that no one complained to him about the lighting in the stairwell (id. at 44, 45). Nesmith's testimony is supported by the Janitorial Schedule which states that employees are to conduct a second walkthrough after their break from 3 to 3:15pm.

At her 50-h hearing, plaintiff testified that she did not know what caused her to fall (50h transcript of plaintiff at 32, 49). Plaintiff testified that she never complained about any condition in the stairwell (id. at 49). At her deposition, plaintiff again testified that she never saw what caused her to slip and did not notice any liquid on the stairs or landing as she was falling (plaintiff's deposition at 40, 46, 68). She also testified that she did not make any written or oral complaint to NYCHA about any condition (id. at 73).

Plaintiff opposes the motion and argues that it is untimely as it was filed on May 14, 2018, 3 days beyond the statutory deadline. Alternatively, plaintiff argues the defendant failed to meet its prima facie burden of proof on the issue of inadequate lighting and the issue of debris and and a wet

condition on the stairs that caused plaintiff to slip and fall. Plaintiff argues that defendant failed to establish that it lacked constructive notice of the condition that caused plaintiff's injuries. As such, plaintiff argues that the instant motion should be denied as untimely and that questions of fact exist warranting denial even if the Court deems the application timely. In support of her opposition, plaintiff submits, among other things, plaintiff's affidavit, page 30th of the deposition transcript of plaintiff's husband, Kevin McKinnon (McKinnon), and an affidavit and report of professional engineer, Andrew R. Yarmus (Yarmus).

At his deposition, McKinnon testified that he did not observe anything on March 26, 2014 that caused his wife to fall (page 30 of McKinnon deposition). McKinnon also testified that while he had seen "urine and all kinds of stuff on the stairwells, being dark in the stairwell, garbage, litter, stuff of that nature," he did not remember when the last time he saw urine or garbage on the stairwell (id.).

Yarmus' affidavit and accompanying report note that the stairwell's lighting fixture was installed behind and obstructed by an adjacent beam resulting in the lighting of the stairwell being obstructed and diminished when a person is descending the stairs (Yarmus Report at 5). Yarmus' inspection of the subject stairwell yielded a reading of 2-3 lux which he deemed a clear violation of a Building Code. Yarmus further opines that while he was not able to cite with certainty which year of the Building Code applied herein, as at the time of his report he was unaware of the age of subject structure and light installation, he is certain editions of Building Code prior to Section 1006.2, required even higher levels of illumination (id. at 5). Additionally, Yarmus opines that if the subject landing and step had not been covered with food or liquid on March 26, 2014, plaintiff's slip and fall would have been prevented (id. at 5).

In reply, NYCHA argues that its motion is timely as it was served on May 9, 2018, within the 120 day-period statutory time. Further, NYCHA argues plaintiff has failed to offer any evidence sufficient to rebut defendant's prima facie showing that it did not have notice of the alleged transient condition that caused plaintiff to fall. Specifically, NYCHA argues that both plaintiff and her husband testified that they did not notice or observe any liquid or debris on the date and time of the plaintiff's slip and fall and did not remember when the last time they saw debris or liquid in the stairwell beforehand. NYCHA also argues that plaintiff's own testimony disproves her claim of inadequate lighting as she testified that the light was working on the date of the accident. Finally, NYCHA argues that Yarmus' opinion is speculative and conclusory and insufficient to raise a triable issue of fact.

On motions for summary judgment, the court's function is issue finding rather than issue determination. see *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957); *Rose v DaEcib USA*, 259 AD2d 258, 686 NYS 2d 19 (1st Dept, 1999). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. see *Rotuba Extruders v Ceppos*, 46 NY 2d 223 (1978); *Sillman v Twentieth Century Fox Film Corp, supra*. The proponent of a motion for summary judgment has the initial burden of the production of sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact. see *Alvarez v Prospect Hospital*, 68 NY 2d 320. Once the initial burden has been satisfied, the burden then shifts to the party opposing the motion to produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. see *Zuckerman v City of New York*, 49 NY 2d 557.

A motion for summary judgment is made when notice of said motion is served. See CPLR 2211. In the case at bar, it is undisputed that the Note of Issue and Certificate of Readiness was filed

January 11, 2018. It is also undisputed that plaintiff was served with the instant motion on May 9, 2018. As such, the Court deems the motion timely. see, *Fomina v DUB Realty, LLC*, 156 AD3d 539, 540, 65 NYS 3d 687, 687-88 (1st Dept 2017); *Derouen v. Savoy Oark Owner*, LLC, 109 AD3d 706, 971 NYS2d 2,3 (1st Dept 2013).

Defendants have established that NYCHA did not create or have actual or constructive notice of the alleged transient condition that allegedly caused plaintiff to slip and fall. NYCHA's caretaker NESMITH testified that he followed protocol and the janitorial schedule on March 26, 2014 pursuant to which he would have swept the stairwell on his second walkthrough after 3:15 and that he would have mopped any spills he encountered (deposition of Nesmith at 8, 11, 13, 15, 20, 25, 30, 31, 39, 40). see *Love v NYCHA*, 82AD3d 588, 919 NYS2d 149 (1st Dept 2011). Said testimony is supported by the Janitorial Schedule marked Exhibit L of the moving papers. Accordingly, defendant established that the stairwell was clean and dry at a minimum of ten minutes prior to the alleged incident, when pursuant to the janitorial schedule, it was last inspected and cleaned by the caretaker, Nesmith. see *Beras v NYCHA*, 118 AD3d 584 (1st Dept 2014). Where "a reasonable cleaning routine was established and followed, liability cannot be imposed." see *Harrison v New York City Transit Authority*, 94 AD3d 512 (1st Dept 2012).

Further, plaintiff and her husband testified that they did notice or observe any debris or liquid on March 26, 2014 at the time of plaintiff's slip and fall (50h transcript of plaintiff at 32, 49; plaintiff's deposition at 40, 46, 68; page 30 of McKinnon deposition). see, *Raghu v New York City Housing Authority*, 72 AD3d 480, 897 NYS2d 436 (1st Dept 2010); *Zanki v Cahill*, 2 AD3d 197, 68 NYS2d 471 (1s Dept 2003). Plaintiff also testified that she never complained to NYCHA about any condition in the stairwell (50h transcript of plaintiff at 49; plaintiff's deposition at 73). Nesmith

also testified that no one ever complained to him about the lighting in the stairwell (deposition of Nesmith at 44, 45). Plaintiff testified that the light fixture was working on March 26, 2014 (deposition of plaintiff at 52,53).

The Court finds on this record that the defendants have established a prima facie showing of entitlement to judgment as a matter of law. see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851(1985). Accordingly, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial of the action. see *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980). To establish a triable issue of fact, plaintiff must show a defect was visible and apparent and existed for a sufficient period of time prior to the accident. see Gordon v American Museum of Natural History, 67 NY2d 836 (1986); *Rivera v 2160 Realty Co., LLC*, 4 NY3d 837 (2005).

Plaintiff has produced no evidence, in admissible form, to establish NYCHA was notified of the transient condition that existed, or that it was present "for a sufficient period of time that defendant's employees had an opportunity to discover and remedy the problem." see *Rivera v 2160 Realty Co., LLC*, 4 NY3d 837 (2005). Contrary to plaintiff's assertions, her evidence fails to demonstrate a specific recurring dangerous condition routinely left unaddressed by defendant as opposed to a mere general awareness of such a condition, for which defendant is not liable. see, *Raposo v New York City Hous. Auth.*, 94 AD3d 533 (1st Dept 2012). Plaintiff's testimony that the lighting in the stairwell is dark to begin with and that the way the light fixture is positioned makes you block the light as you descend, making it darker in the stairwell, is a feigned issue of fact and insufficient, as a matter of law, to defeat the instant motion. see *Ali v City of New York*, 57 AD3d

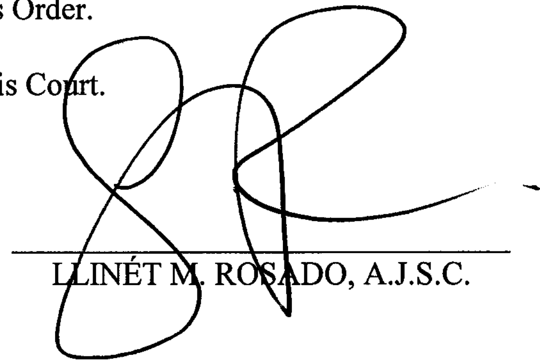
391, 870 NYS2d 263 (1st Dept 2008). Finally, Yarmus' opinion is speculative, conclusory, unsupported by any evidentiary foundation, and insufficient to withstand summary judgment. see *Dibble v New York City Transit Authority*, 76 AD3d 272, 903 NYS2d 376 (1st Dept 2010).

Accordingly, it is hereby

ORDERED, that defendant NYCHA's motion to dismiss pursuant to CPLR 3212 and is hereby granted and the complaint dismissed, it is further

ORDERED that defendant NYCHA shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of this Order.

This constitutes the decision and order of this Court.



Dated: October 1, 2018

LLINÉT M. ROSADO, A.J.S.C.

HON. LLINET ROSADO