SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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HENRY RIVERA,

Plaintiff

- against -

CITY OF NEW YORK and NEW YORK CITY HOUSING AUTHORITY,

Defendants

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Index No. 150993/2016

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff seeks damages for injuries he suffered after he slipped on a staircase in an apartment building owned by defendant New York City Housing Authority (NYCHA) at 220 East 102nd Street in New York County. In an order dated April 29, 2016, the court (d'Auguste, J.) granted defendant City of New York's motion to dismiss plaintiff's claims against the City.

Plaintiff claims that he slipped on a puddle of water on the staircase due to NYCHA's negligence in failing to maintain the staircase. Plaintiff alleges that NYCHA failed to inspect the staircase regularly to prevent the dangerous condition from remaining on the staircase or to warn of the dangerous condition when it did remain there.

NYCHA now moves for summary judgment dismissing plaintiff's claims against NYCHA, C.P.L.R. § 3212(b), claiming that it establishes its lack of notice of the dangerous water condition and that no evidence shows NYCHA created the dangerous condition

or how long the condition remained on the staircase before plaintiff's injury. Plaintiff cross-moves to amend his notice of claim to reflect that his injury occurred March 9, 2015, at 7:00 p.m., rather than March 10, 2015, at 4:30 p.m. as set forth in his notice of claim. N.Y. Gen. Mun. Law (GML) § 50-e(6).

II. UNDISPUTED FACTS

Plaintiff resides on the third floor of NYCHA's building with his sister and her son, plaintiff's nephew, Isaac Mattos. There are two interior staircases in the building: staircase A and staircase B. Plaintiff alleges that he exited his apartment to dispose of garbage around 7:00 p.m. March 9, 2015, and was descending staircase B when he slipped on a puddle of water near the third floor landing.

Plaintiff filed a notice of claim April 27, 2015, alleging that his injury occurred March 10, 2015, at 4:30 p.m. Plaintiff later testified at his hearing pursuant to GML § 50-h that his notice of claim was mistaken: his injury had occurred March 9, 2015, around 7:00 p.m. The Fire Department of the City of New York ambulance's prehospital care report shows that the Fire Department received notice of plaintiff's injury at 7:52 p.m., and an ambulance picked up and treated plaintiff at 7:59 p.m. March 9, 2015. Plaintiff later testified at his deposition that his injury occurred as alleged in his notice of claim, March 10, 2015, at 4:30 p.m., which he also now claims was a mistake.

III. PLAINTIFF'S CROSS-MOTION TO AMEND HIS NOTICE OF CLAIM

General Municipal Law (GML) § 50-e(6) provides that:

> At any time after the service of a notice of claim . . . , a mistake, omission, irregularity or defect made in good faith in the notice of claim . . . may be corrected, supplied or disregarded, as the case may be, at the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

Plaintiff seeks to change the date and time of his injury in his notice of claim from March 10, 2015, at 4:30 p.m. to March 9, 2015, at 7:00 p.m. NYCHA insists that this change would prejudice NYCHA's ability to investigate the circumstances of the injury. NYCHA admits, however, that at the hearing conducted by NYCHA pursuant to GML § 50-h October 21, 2015, plaintiff testified that the notice of claim was incorrect, and his injury occurred March 9, 2015, at 7:00 p.m. NYCHA also admits that the Fire Department ambulance's prehospital care report corroborates plaintiff's testimony at the hearing. NYCHA therefore received notice that the injury occurred March 9, 2015, at 7:00 p.m., two and a half years before disclosure concluded, which provided NYCHA ample time to investigate the circumstances of the injury.

In fact, when NYCHA investigated, its caretaker of the building was unaware of anyone falling on the staircase on either March 9 or March 10, 2015, or even whether he was working in the building on either date. NYCHA does not claim, let alone show, that it was unable to locate other maintenance personnel, tenants, or other witnesses familiar with staircase B's condition, locate records, or otherwise reconstruct the circumstances relating to March 9, as opposed to March 10, 2015.

Nor does NYCHA's current motion indicate any inability to address both dates. Based on its investigation, its motion urges that the accurate date and time are the same date and time that plaintiff's cross-motion now claims.

NYCHA thus fails to explain how the change in date and time would impede or otherwise prejudice NYCHA's investigation. Absent such prejudice, as GML § 50-e(6) provides, the court grants plaintiff's cross-motion to correct the date and time of his injury in his notice of claim from March 10, 2015, at 4:30 p.m. to March 9, 2015, at 7:00 p.m. Hollman v. 480 Assoc. Inc., 138 A.D.3d 637, 638 (1st Dep't 2016); Weiss v. City of New York, 136 A.D.3d 575, 575 (1st Dep't 2016); Arroyo v. New York City Hous. Auth., 12 A.D.3d 254, 255 (1st Dep't 2004); Fabian v. New York City Tr. Auth., 271 A.D.2d 244, 245 (1st Dep't 2000).

III. NYCHA'S MOTION FOR SUMMARY JUDGMENT

A. Applicable Standards

To obtain summary judgment, NYCHA must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). Only if NYCHA satisfies this standard, does the burden shift to plaintiff to rebut that prima facie showing, by producing evidence, in

admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of NYCHA's motion, the court construes the evidence in the light most favorable to plaintiff. De Lourdes Torres v. Jones, 26 N.Y.3d at 763; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

NYCHA is liable for a hazardous condition on NYCHA's premises that caused plaintiff's injury if NYCHA created the hazard or received actual or constructive notice of the hazard within a reasonable time to have corrected or warned of the hazard before his injury, but failed to do so. Derix v. Port Auth. of N.Y. & N.J., 162 A.D.3d 522, 522 (1st Dep't 2018); Pintor v. 122 Water Realty, LLC, 90 A.D.3d 449, 451 (1st Dep't 2011); Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 500 (1st Dep't 2008); Alexander v. New York City Tr., 34 A.D.3d 312, 313 (1st Dep't 2006). Therefore, to obtain summary judgment, NYCHA must make a prima facie showing that NYCHA maintained its premises in a reasonably safe condition and received neither actual nor constructive notice of any unsafe condition that caused plaintiff's fall sufficiently in advance to have corrected or warned of the condition before his fall. Parietti v. Wal-Mart

Stores, Inc., 29 N.Y.3d 1136, 1137 (2017); Graham v. YMCA of Greater N.Y., 137 A.D.3d 546, 547 (1st Dep't 2016); Navarro v. H. Heiden, LLC, 115 A.D.3d 564, 564 (1st Dep't 2014); Rodriguez v. New York City Hous. Auth., 102 A.D.3d 407, 407 (1st Dep't 2013).

B. NYCHA's Failure to Establish a Conclusive Defense

Steven Harry, the caretaker of NYCHA's building at 220 East 102nd Street, testified at his deposition that he was unaware of plaintiff's injury and did not recall whether he even worked at that building in March 2015. NYCHA now presents Harry's affidavit that his practice was to inspect both staircases in the building every day, once in the morning and once before the end of his job shift at 4:30 p.m., Aff. of Thomas A. Ratigan Ex. K ¶ 4; that he performed these inspections March 9, 2015; and, had he observed any wetness or liquid, he would have cleaned, dried, or removed the condition. Id. ¶ 7.

The court must disregard Harry's affidavit because it conflicts with his deposition testimony that he did not recall if he even worked at the building March 9, 2015, and was completely unaware of the circumstances surrounding plaintiff's fall: the condition of the staircase and when it last had been inspected before plaintiff's fall. Harry's current affidavit to the contrary has been tailored to avoid the consequences of his prior testimony. Vazquez v. Takara Condominium, 145 A.D.3d 627, 627 (1st Dep't 2016); Perine Intl. Inc. v. Bedford Clothiers, Inc., 143 A.D.3d 491, 492 (1st Dep't 2016); Villafane v. Indus. Constr. Mgt., Ltd., 137 A.D.3d 526, 527 (1st Dep't 2016); In re Schuman,

132 A.D.3d 551, 552 (1st Dep't 2015). At minimum, the conflict between his affidavit and his testimony raises material factual issues regarding his presence at the building, the condition of the staircase, and when it last had been inspected before plaintiff's fall. See DiCembrino v. Verizon N.Y. Inc., 149 A.D.3d 541, 541-42 (1st Dep't 2017). NYCHA presents no other evidence corroborating Harry's affidavit, such as employment records that Harry did work at the building March 9, 2015, or establishing that NYCHA lacked notice of the water condition before plaintiff's fall.

Even if the court accepts Harry's affidavit as true, it still does not demonstrate that NYCHA lacked notice of the puddle on which plaintiff fell. Harry's carefully worded affidavit never attests when he inspected the area where plaintiff fell March 9, 2015; or, most significantly, that he did not find any water, wetness, or other hazardous condition in that area; or that he did find a hazardous condition, but remedied it.

Thus Harry's affidavit, at best, establishes only that defendant lacked notice of any hazardous condition on the staircase where plaintiff fell before his fall, if the court draws every possible inference in NYCHA's favor. From Harry's attestation that, if Harry had conducted his regular afternoon inspection March 9, 2015, and, during that inspection, found a hazardous condition on staircase B, he would have addressed the condition, the court must infer either that there was no puddle or, if there was, Harry discovered and remedied it. The court

may not draw such inferences to close the gaps in Harry's affidavit, however, because the court must construe all the evidence in plaintiff's favor, not in NYCHA's favor, upon its motion for summary judgment. De Lourdes Torres v. Jones, 26 N.Y.3d at 763; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d at 37.

Finally, NYCHA fails to eliminate any question whether NYCHA's maintenance of the building caused the water condition on its staircase. Plaintiff testified that the water on which he slipped was soapy. Harry testified that his practice was to mop the staircases on Wednesdays and Fridays, which would not have included March 9, 2015, a Monday, but admitted that he used a soapy cleaning agent when he mopped. He does not address whether any other building employee ever mopped the staircases on Mondays or whether he or other building employees ever mopped outside their routine, when a particular condition required cleaning. Neither his deposition nor his affidavit denies that he or any other building employee mopped staircase B between the third and second floors in the afternoon or evening of March 9, 2015. See Jackson v. Whitson's Food Corp., 130 A.D.3d 461, 462 (1st Dep't 2015); Tucker v. New York City Hous. Auth., 127 A.D.3d 619, 620 (1st Dep't 2015); Velez v. New York City Hous. Auth., 91 A.D.3d 422, 422 (1st Dep't 2012); Nugent v. 1235 Concourse Tenants Corp., 83 A.D.3d 532, 532 (1st Dep't 2011). For this reason and all the reasons set forth above, NYCHA fails to establish its prima facie entitlement to summary judgment by demonstrating that

NYCHA employees did not create the dangerous water condition on which plaintiff fell and lacked notice of the water condition long enough before plaintiff's injury to discover and remedy the condition.

C. Plaintiff's Rebuttal

Even if the court both accepts Harry's affidavit and draws inferences in NYCHA's favor, his affidavit establishes at most that there was no hazardous condition on the staircase as of 4:30 p.m. March 9, 2015. Plaintiff, in opposition, presents his hearing testimony that he slipped on the puddle of water at 7:00 p.m., which is corroborated by the Fire Department's prehospital care report. This evidence poses factual issues regarding whether water accumulated on the staircase in the approximately three hours between Harry's last possible inspection and plaintiff's fall and whether this period was long enough for another building employee to have discovered and remedied it. Hill v. Manhattan N. Mgt., 164 A.D.3d 1187, 1188 (1st Dep't 2018); Morabito v. 11 Park Pl. LLC, 107 A.D.3d 472, 472-73 (1st Dep't 2013); Munoz v. Uptown Paradise T.P. LLC, 69 A.D.3d 401, 401-402 (1st Dep't 2010). See Parietti v. Wal-Mart Stores, Inc., 29 N.Y.3d at 1137.

Plaintiff also presents the affidavit of Isaac Mattos, plaintiff's nephew who lived in the same apartment as plaintiff. Mattos attests that he observed water dripping from the staircase on the third floor down to the staircase on the second floor at 7:30 a.m. and at 5:00 p.m. on the day of plaintiff's injury,

which conflicts with Harry's affidavit that Harry would have addressed any water on the staircases. Aff. of Rhonda Katz Ex. B ¶¶ 2-3. Mattos adds that he often observed water on the staircase without any warning sign after building employees had mopped the area.

Although there were two interior staircases in the building, and Mattos does not indicate whether he observed the water dripping on staircase B where plaintiff fell, the court, construing all evidence in plaintiff's favor, may infer that Mattos used the same staircase to enter and exit his apartment as plaintiff, since they lived in the same apartment. De Lourdes Torres v. Jones, 26 N.Y.3d at 763; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d at 37. Even without this inference, Mattos's affidavit still raises a factual issue whether water was dripping and accumulating near the third floor on staircase B or on staircase A and still conflicts with Harry's affidavit that Harry inspected both staircases and would have addressed any hazardous conditions during those inspections. NYCHA presents no evidence in reply to indicate the absence of water accumulation on staircase B at 7:00 p.m. March 9, 2015, or to rebut Mattos, thus leaving a factual issue whether there was a puddle of water on that staircase when plaintiff fell there at 7:00 p.m.

IV. CONCLUSION

For all the reasons explained above, the court denies defendant New York City Housing Authority's motion for summary

judgment, C.P.L.R. § 3212(b), and grants plaintiff's cross-motion to correct the date and time of his injury in his notice of claim from March 10, 2015, at 4:30 p.m. to March 9, 2015, at 7:00 p.m. GML § 50-e(6). This decision constitutes the court's order.

DATED: December 7, 2018

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.