Mendez v Scicchitano
2018 NY Slip Op 34450(U)
January 12, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 15-605429
Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 15-605429
CAL. No. 17-05186OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY, J.S.C.

MOTION DATE 8-29-17
ADJ. DATE 8-29-17
Mot. Seq. # 001 - MotD

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DINORA MENDEZ,

Plaintiff,

- against -

FRANK SCICCHITANO, PENNY TONEATTI-SCICCHITANO and SCHICKY, INC.,

Defendants.

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CANNON & ACOSTA, LLP
Attorney for Plaintiff
1923 New York Avenue
Huntington, New York 11746

LAW OFFICE OF ANDREA G. SAWYERS
Attorney for Defendants
3 Huntington Quadrangle, Suite 1025
Melville, New York 11747

Upon the following papers numbered 1 to 9 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 9 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Frank Scicchitano, Penny Toneatti-Scicchitano, and Schicky, Inc., for summary judgment dismissing the complaints against them is granted to the extent indicated herein and is otherwise denied.

This action was commenced by plaintiff Dinora Mendez to recover damages for injuries she allegedly sustained on January 3, 2015, when she fell down a interior stairway located at the premises known as 94 West 11th Street, Huntington Station, New York. By her bill of particulars, plaintiff alleges the carpeting on the stairs was "uneven and worn," that the stairs were "uneven and angled downwards," that the stairs lacked a handrail, and that the stairs violated Property Maintenance Code of New York State §§ 124-15 (D) and 124-18 (A), and Code of the Town of Huntington §§ 305.4 and 306.1.

Defendants now move for summary judgment in their favor, arguing that Schicky, Inc. was the owner of the subject premises, not Frank Scicchitano and Penny Toneatti-Scicchitano; that Schicky, Inc. was an out-of-possession landlord; that Schicky, Inc. had no actual or constructive notice of the alleged dangerous condition; that the alleged dangerous condition was open and obvious; and that the alleged defect was trivial. In support of their motion, defendants submit copies of the pleadings, a transcript of

plaintiff's deposition testimony, a transcript of defendant Frank Scicchitano's deposition testimony, 12 color photographs, an affidavit of Frank Scicchitano, uncertified copies of two deeds, an uncertified copy of a certificate of occupancy, and an uncertified copy of an electrical approval certificate.

At her deposition, plaintiff Dinora Mendez testified that she rented two rooms on the second floor of the house at the subject premises for a period of four years– three years prior to her accident, and one year subsequent. She indicated that she rented the two rooms from a man named Freddy Carbajal. She explained that Mr. Carbajal did not reside at the subject premises, but that his girlfriend and his children did. She stated that the numerous other bedrooms of the house were rented by other individuals or families, with a high turnover rate.

Plaintiff testified that at 11:30 p.m. on the date in question, she was in the process of descending the interior, carpeted staircase at the subject premises. She indicated that she had walked from her bedroom, then through the kitchen located at the top of the staircase. She stated that the kitchen's light was on, but that the light above the staircase was not, because "it was burnt out and they never changed it." She testified that the staircase overhead light remained in that condition for "four to six months." Plaintiff stated that she attempted to put a bulb in the socket herself, but that it was too high for her to reach. Plaintiff indicated that she asked Mr. Carbajal to put a lightbulb in the fixture "five or six times" to no avail. Plaintiff testified that another resident at the home, a man named Jose, also complained to Mr. Carbajal about the inoperative light, and fell down the same stairs two months prior to her own fall. Plaintiff further testified that there was no handrail on the subject stairs on the night of Jose's fall, on the night she fell, or at any time prior. Upon questioning as to whether she believed Mr. Carbajal owned the house, she stated "I'm not sure, but I think he rented it."

Plaintiff testified that she stepped down onto the first step with her right foot, then brought her left foot down on the second step. She indicated that when her left foot landed on the second step, it slipped out from underneath her. She testified she attempted to grab onto something, but no handrail was present, and she fell down the stairs. Plaintiff denied there being any substance or object on the step which caused her foot to slip, or that the carpet was ripped or torn; she only asserted that the carpeted step was "smooth."

Defendant Frank Scicchitano testified that the house at the subject premises underwent a total renovation less than five years before the accident date. He indicated that the stairs in question were installed at the time of that renovation, but that they had been re-carpeted approximately three times prior to plaintiff's fall. He further stated that, when installed, the stairs had a wooden handrail present.

Mr. Scicchitano testified that he visited the subject premises "a couple of times a month," but that he did not always go inside. He denied having a property manager for the subject premises, but explained that his bilingual landscaper, Freddy Carbajal, would be there "every day," would collect the rent, and "if anybody had a problem they would tell him." Mr. Scicchitano stated that Mr. Carbajal performed those services without compensation, but would be paid for his landscaping work. Mr. Scicchitano further stated that while Mr. Carbajal would perform minor interior repairs at the subject premises, such as installing new batteries, he would handle larger projects. He indicated the tenants had no responsibility for maintenance at the premises. Mr. Scicchitano testified that he never received any

complaints from tenants regarding missing handrails on the interior staircase, poor lighting, or worn carpeting. However, he stated following plaintiff's alleged fall, he inspected the premises and found the handrail of the interior staircase missing. Finally, Mr. Scicchitano indicated that his wife, Penny Toneatti-Scicchitano, has never been to the subject premises, has no ownership interest in it, and holds no position in Schicky, Inc.

In his affidavit submitted in support of the instant motion, Mr. Scicchitano states that he owned the subject premises from June 13, 1995 until December 27, 2012, at which time he transferred his interest in the property to Schicky, Inc. He further states that the aforementioned renovations were completed in August of 2013, and that the Town of Huntington issued a certificate of occupancy for the premises. In addition, Mr. Scicchitano avers that, "[t]ypically, it is the tenant's responsibility to change interior light bulbs at a rental premises." Regarding the missing handrail, he states that neither he nor any other defendant removed it following the August 2013 remodeling. He speculates that a tenant may have removed it to facilitate the movement of furniture, and that he never noticed it missing during any of his visits to the premises.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by defendant to plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach (*see* ***Solomon v City of New York***, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]). Liability for a dangerous condition on real property "is generally predicated upon ownership, occupancy, control, or special use of the subject premises" (***Casson v McConnell***, 148 AD3d 863, 864, 49 NYS3d 711 [2d Dept 2017]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). However, "the owner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" (***Bluth v Bias Yaakov Academy for Girls***, 123 AD3d 866, 866, 999 NYS2d 840 [2d Dept 2014]).

A defendant in a trip-and-fall case seeking to establish entitlement to summary judgment may meet its initial burden by demonstrating that it did not own, possess, or otherwise control the property where the accident occurred (*see* ***Suero-Sosa v Cardona***, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]; ***Cerrato v Rapistan Demag Corp.***, 84 AD3d 714, 921 NYS2d 648 [2d Dept 2011]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that it did not create the defective condition, or have actual or constructive notice of its existence for a sufficient length of time to discover and repair it (*see* ***Lezama v 34-15 Parsons Blvd, LLC***, 16 AD3d 560, 792 NYS2d 123 [2d Dept 2005]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Toma v Rizkalla***, 138 AD3d 1103, 30 NYS3d 321 [2d Dept 2016]; ***Willis v Galileo Cortlandt, LLC***, 106 AD3d 730, 964 NYS2d 576 [2d Dept 2013]). In addition, "[a]n out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (***Casson v McConnell***, *supra* at 864 [internal quotations omitted]).

Initially, defendant Penny Toneatti-Scicchitano has established a prima facie case of entitlement to summary judgment by adducing evidence that she did not own, possess or otherwise control the premises (*see* ***Suero-Sosa v Cardona***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff submits no opposition to defendants' motion. Accordingly, the branch of the motion for summary judgment dismissing the complaint against defendant Penny Toneatti-Scicchitano is granted.

Defendant Frank Scicchitano has also established a prima facie case of entitlement to summary judgment (*see* ***Suero-Sosa v Cardona***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). By his sworn affidavit, Mr. Scicchitano has shown that he transferred his interest in the subject premises to Schicky, Inc. in 2012 and, therefore, did not own it at the time of plaintiff's accident. The Court notes that the two recorded deeds supplied by defendants' counsel, purporting to support Mr. Scicchitano's statement concerning ownership of the subject premises, convey different parcels of real property. The deed dated June 13, 1995 conveys a parcel known by the Suffolk County Clerk's Office as Tax Map number 0400-137.00-03.00-010.001 (part of lot number 532 on the filed map of "Huntington Manor"). The deed dated December 27, 2012 conveys a parcel known by the Suffolk County Clerk's Office as Tax Map number 0400-137.00-03.00-010.002 (part of lot number 533 on the filed map of "Huntington Manor"). Even though the deeds, as submitted, fail to show a transfer of the subject premises to Schicky, Inc., Mr. Scicchitano averred to that fact in his affidavit. Therefore, Mr. Scicchitano has successfully established, prima facie, that he did not own the subject property at the time in question. The burden then shifted to plaintiff to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*). Plaintiff submits no opposition to the instant motion. Accordingly, the branch of the motion for summary judgment dismissing the complaint against defendant Frank Scicchitano is granted.

However, as to defendant Schicky, Inc., it has failed to establish a prima facie case of entitlement to summary judgment (see ***Lopez-Serrano v Ochoa***, 149 AD3d 1063, 52 NYS3d 480 [2d Dept 2017]). While defendant argues plaintiff did not explicitly identify the cause of her alleged fall, which is correct, she testified she attempted to grab a non-existent handrail to arrest that fall (*see* ***DeCarlo v Vacchio***, 147 AD3d 724, 45 NYS3d 581 [2d Dept 2017]; *cf.* ***Baker v R.C. Church of the Holy See***, 136 AD3d 596,

26 NYS3d 48 [1st Dept 2016]). Mr. Scicchitano, president of Schicky, Inc., acknowledged that no handrail was present at the time of plaintiff's accident, and has not established the subject premises was exempt from the applicable building codes (*see* ***Asaro v Montalvo***, 26 AD3d 306, 812 NYS2d 558 [2d Dept 2006]).

Defendant's counsel argues defendant had no notice of a missing handrail. However, such argument is unavailing. Mr. Scicchitano testified that he visited the subject premises regularly, and that he performed certain repairs to same. He further testified that Mr. Carbajal collected rents and received tenant complaints on his behalf. Mr. Scicchitano was unable to specify when he, or another agent of Schicky, Inc., last inspected the subject premises prior to plaintiff's accident. Therefore, he failed to establish a prima facie case of lack of constructive notice (*see* ***Altinel v John's Farms***, 113 AD3d 709, 979 NYS2d 360 [2d Dept 2014]). In addition, triable issues exist as to whether Freddy Carbajal acted as defendant's *de facto* property manager and whether the absence of a handrail was a proximate cause of plaintiff's accident (*see* ***Lee v Acevedo***, 152 AD3d 577, 59 NYS3d 66 [2d Dept 2017]; ***Lopez-Serrano v Ochoa***, 149 AD3d 1063, 52 NYS3d 480 [2d Dept 2017]; ***Bencebi v Baywood Realty, LLC***, 123 AD3d 1071, 1 NYS3d 214 [2d Dept 2014]; ***McLeod v NDI Webster/Clay Hous. Dev. Fund Corp.***, 125 AD3d 506, 6 NYS3d 1 [1st Dept 2015]; ***Asaro v Montalvo***, *supra*). Accordingly, the branch of the motion for summary judgment dismissing the complaint against defendant Schicky, Inc., is denied.

Dated: January 12, 2018

J.S.C.

HON. DAVID T. REILLY

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**