Delacruz v City of New York
2019 NY Slip Op 31276(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 152151/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 152151/2015

SILVIA DELACRUZ,

Plaintiff,

MOTION SEQ. NO. 004

- v -

THE CITY OF NEW YORK and NEW YORK CITY HOUSING AUTHORITY,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for SUMMARY JUDGMENT.

In this slip and fall action commenced by plaintiff Silvia Delacruz, defendant New York City Housing Authority ("NYCHA") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After consideration of the parties' contentions, and after a review of the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly injured on June 13, 2014 when she slipped and fell on a slippery substance in the hallway near the garbage chute of the 11th floor of the apartment building in which she resided at 118 Avenue D in Manhattan. Docs. 64 and 65. The building was part of the Jacob Riis Houses, a housing complex owned by NYCHA. Doc. 65.

In July of 2014, plaintiff filed a notice of claim against defendants the City of New York ("the City") and NYCHA. Doc. 64. Plaintiff subsequently commenced the captioned action

against the City and NYCHA by filing a summons and verified complaint on March 4, 2015. Doc. 65.[1] NYCHA joined issue by its verified answer filed August 31, 2015. Doc. 65.

In her bill of particulars plaintiff alleges, inter alia, that NYCHA was negligent in failing to maintain the premises and failing to warn her about the dangerous condition. Doc. 66. Plaintiff further claims that NYCHA had actual and/or constructive notice of the condition. Doc. 66.

At her 50-h hearing, plaintiff testified, inter alia, that she fell on a substance which she believed was oil or grease. Doc. 69 at 29-30. She also said that there was a "little box" and white powder on the floor in the area. Doc. 69 at 36-37. She did not notice the presence of the substance until after she fell. Doc. 69 at 31. The substance was located near the 11th floor garbage chute. Doc. 69 at 32, 84-85. There was no tape or warning sign in the area where she fell. Doc. 69 at 83.

Plaintiff subsequently appeared for an examination before trial at which she testified, inter alia, that she was injured on June 14, 2013 at approximately 4 p.m. when she fell on "little papers", grease, and white powder in the hallway of the 11th floor of the building. Doc. 70 at 22, 24, 28-29. There was no warning sign or tape in the area where she fell. Doc. 70 at 30.

Brandon Burch, an employee of NYCHA, appeared for deposition on its behalf and testified that, on the date of the incident, he was the janitorial caretaker of plaintiff's building. Doc. 71 at 11, 15, 70. Burch reported to Anthony Carter, an assistant superintendent, who was "supposed to" keep a log book reflecting "what got done and what did not get done" but Burch did not know whether Carter did so. Doc. 71 at 12, 44-45.

Burch's duties as caretaker included cleaning the floors of the building. Doc. 71 at 40. In June of 2014, Burch followed a cleaning/maintenance schedule each day. Doc. 71 at 28.[2] The

[1] All claims against the City were dismissed by this Court (Kotler, J.) by order dated December 22, 2015. Doc. 18.

[2] The schedule (Doc. 73) was authenticated by Burch at his deposition.

schedule was not identical for each day. Doc. 71 at 27. The schedule for Friday, which was the day of the week on which the incident allegedly occurred, included a "safety walk-down"[3] from 8:10-8:20 in which he or a staff member was to look for hazardous conditions; sweeping and mopping the lobby floors, elevators, and stairs from 8:20-9:10 a.m.; emptying waste baskets from 9:10-10 a.m.; servicing compactors and removing trash bags from 10:15 a.m.-11:15 a.m.; and sweeping and dusting the entire building and removing urine and feces stains and any hazardous conditions from 11:15 a.m.-12:00 p.m. After a lunch break, floors 1-7 were mopped from 12:35-3:00 p.m. Doc. 73. Burch kept no checklist regarding what tasks he performed. Doc. 71 at 43-44.

In June 2014, Burch mopped each floor of the building "[a]bout once a week" and swept the floors every day. Doc. 71 at 40, 41, 43. The floors would also be cleaned at other times if there were a spill of if urine was present. Doc. 71 at 54-55. The 11th floor was mopped on Wednesdays. Doc. 73.

Each floor of the building had a garbage "hopper", or chute, for the disposal of trash. Doc. 71 at 31-35. Burch conceded that there were spills in the vicinity of the garbage chutes "all of the time." Doc. 71 at 57. He also admitted that the building was "notoriously dirty" and that there was "garbage everywhere." Doc. 71 at 58-59. However, he maintained that he was not aware of any prior slip and fall accidents in the building (Doc. 71 at 61-62) or of any messes or spills in the area of the 11th floor chute. Doc. 71 at 67-68. In fact, he represented that the 11th floor "was one of the floors that the tenants really kept up really good so it wasn't too much mess on the 11th floor. It wasn't that bad." Doc. 71 at 68.

[3] In an affidavit in support of the motion, Burch explained that a walk down "would involve proceeding from the highest floor of the building down one stairwell to the next floor, inspecting, sweeping and cleaning the corridor on that floor then proceeding to the other staircase." He "would then proceed down that staircase to the floor below [to] inspect, sweep and clean that corridor and return to the other staircase." Doc. 74. The walk down included the inspection of the 11th floor. Doc. 74.

Laura Gonzalez appeared for a nonparty deposition pursuant to a subpoena served by NYCHA. She testified that she, too, lived on the 11th floor of the building in June 2014 and that there were times when the area around the garbage chute on that floor remained uncleaned for almost one week. Doc. 72 at 15-17. She represented that the messy condition around the garbage chute, which included "oily or greasy puddles", arose from residents disposing of their trash. Doc. 72 at 15-22. After plaintiff fell, she told Gonzalez about the slippery substance near the chute and, although Gonzalez observed a condition on the floor, she did not know whether she saw it on or after the day of the incident and was not certain that it was the same substance on which plaintiff fell. Doc. 72 at 20-21, 28, 36, 47-50. Gonzalez added that she would sometimes clean the area herself. Doc. 72 at 44.

Prior to the incident, Gonzalez saw "scraps of food" in the area of the 11th floor chute two or three times per week and "oily or greasy puddles" "maybe once a week or less." Doc. 72 at 16-19. Although she complained to NYCHA about the messy conditions around the chute, she did not recall when she made such complaints or the last time she did so prior to the alleged incident. Doc. 72 at 17-18, 43-45, 56-58. Nor did she recall the last time prior to the incident that she saw garbage or oil in that area. Doc. 72 at 46. Gonzalez never noticed any signs or caution tape around any garbage or oily areas in the vicinity of the chute. Doc. 72 at 18-19.

Plaintiff filed a note of issue on October 5, 2018. Doc. 67.

NYCHA now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Doc. 62. In support of the motion, NYCHA argues that it did not create or have actual or constructive notice of the condition which allegedly caused plaintiff's fall. Doc. 63. Additionally, NYCHA argues that it could not have had notice of a recurring condition left unaddressed since Burch established that it followed a daily cleaning schedule. Doc. 62.

In opposition, plaintiff argues the motion must be denied since NYCHA fails to establish that it lacked actual and constructive notice of the allegedly hazardous condition. Doc. 78. Plaintiff also asserts that a question of fact exists regarding whether NYCHA negligently failed to remedy a recurring condition about which it had actual and constructive notice. Doc. 78.

In reply, NYCHA argues, inter alia, that it clearly established that it did not have actual or constructive notice of the condition and that, even if a recurring condition existed, such fact would not warrant denial of the motion. Doc. 83.

LEGAL CONCLUSIONS:

In order for a defendant to prevail on a motion for summary judgment in a slip and fall case, it must make a prima facie showing that it neither created the condition that caused the plaintiff's fall nor had actual or constructive notice of such a condition. *See Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-975 (2d Dept 2012), *lv dismissed* 20 N.Y.3d 965; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 (1st Dept 2011).

Here, NYCHA failed to establish its prima facie entitlement to summary judgment. Specifically, it failed to establish that it did not have actual or constructive notice of the allegedly hazardous condition. Although Burch testified that he conducted a "walk down" on the date of the alleged incident in accordance with the building's cleaning schedule, he failed to state, at his deposition or in his affidavit in support of the motion, what he observed during the "walk down", specifically whether he observed any slippery substance in the vicinity of the 11th floor chute. *See Covington v New York City Hous. Auth.*,135 AD3d 665 (1st Dept 2016). Although Burch was not aware of any prior slip and fall accidents in the building or of any messes or spills in the area of the 11th floor chute, he also admitted that the building was "notoriously dirty" and that there was

"garbage everywhere." Doc. 71 at 58-59, 61-62, 67-68. Thus, his affidavit and testimony fail to establish, as a matter of law, that NYCHA was had no constructive notice of the alleged condition.[4] Additionally, although not raised by plaintiff, this Court notes that NYCHA submits no evidence that it did not create the condition or that it lacked actual notice of the same.

Even assuming, arguendo, that NYCHA established its prima facie entitlement to summary judgment, Gonzalez's testimony that she called NYCHA prior to the date of the accident to complain about the conditions near the 11th floor chute would create an issue of fact regarding whether it had actual notice of the condition. Additionally, Gonzalez's testimony that garbage and other substances in the area of the chute were a recurring condition which, at times, remained unaddressed for days, raises an issue of fact regarding whether NYCHA had constructive notice of the condition.

In support of its motion NYCHA relies, inter alia, on *Canteen v New York City Hous. Auth.*, 164 AD3d 418 (1st Dept 2018). In that case, the Appellate Division, First Department stated that:

> Defendant established its entitlement to judgment as a matter of law by establishing that it did not have actual or constructive notice of the urine on the staircase that allegedly caused plaintiff to fall. Defendant submitted, inter alia, the affidavit of its caretaker, who averred that it was his practice to inspect the staircase at issue twice each day, in the morning and at around 3:30 p.m., and to mop up any urine or other wet or slippery condition that he observed. He also stated that it was his practice to complete a checklist with regard to his morning inspection, and he attached and identified a copy of the checklist that he had completed as to the morning inspection on July 2, 2012, the day before plaintiff's fall. In addition, he specifically stated that no one had complained to him about urine in a stairwell between his afternoon inspection on July 2 and the time his shift ended.

[4] Burch's testimony that the 11th floor was, by comparison, neater than other floors in the building (Doc. 71 at 68) does not change this result, since there is, at the very least, a question of fact regarding whether the relative cleanliness of that floor was attributable to cleaning performed by Gonzalez. Doc. 72 at 44.

Canteen, 164 AD3d at 418 (citations omitted).

Canteen is clearly distinguishable from the captioned action. Unlike the caretaker in *Canteen*, Burch did not keep a checklist reflecting precisely what work he did. Doc. 71 at 43-44. Additionally, Burch was not certain whether his supervisor, Carter, kept a logbook, as he was required to do, reflecting "what [work] got done and what [work] did not get done." Doc. 71 at 12, 44-45. Thus, the proof submitted by NYCHA regarding the absence of notice was far stronger in *Canteen* than in the captioned action.

Although this Court recognizes that the Appellate Division, First Department has held that a municipal authority cannot be liable where it demonstrates that "a reasonable cleaning routine was established and followed" (*Harrison v New York City Trans. Auth.*, 94 AD3d 512 [1st Dept 2012]), Burch's affidavit in support of the motion is conclusory and is thus insufficient to entitle NYCHA to summary judgment. *See Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429 (1st Dept 2010). Specifically, although Burch represents in his affidavit that he "would follow the [j]anitorial [s]chedule" marked at his deposition, he does not specifically address, as noted above, the findings, if any, which he made during his "walk down" of the premises, or whether he noticed and/or addressed any hazardous condition in the area of the 11th floor chute, especially given his testimony that there were spills in the vicinity of the garbage chutes "all of the time." Doc. 71 at 57.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

5/6/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE