Mayes v Bartley
2019 NY Slip Op 33795(U)
November 4, 2019
Supreme Court, Queens County
Docket Number: 713409/2017
Judge: Cheree A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 713409/2017
CATHY MAYES,

Plaintiff,

Motion
Date: October 23, 2019

-against-

Motion Cal. No.: 29

ZADIE BARTLEY and MARIA BARTLEY,

Motion Sequence No.: 1

Defendants.
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The following efile papers numbered 15-28, 38-39 and 41-42 submitted and considered on this motion by defendants ZADIE BARTLEY and MARIA BARTLEY (hereinafter referred to as "Defendants") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR")3212 granting Defendants summary judgment dismissing plaintiff CATHY MAYES' (hereinafter referred to as "Plaintiff") complaint and for such other and further relief as this court deems just and proper.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 15-28
Affirmation in Support-Affidavits-Exhibits.....	EF 38-39
Reply- Affidavits.....	EF 41-42

This premises liability action was commenced by Plaintiff on September 6, 2017 as a result of a slip and fall accident which occurred on August 16, 2017 in an interior staircase at the premises known as 211-40 99th Avenue, County of Queens, State of New York (hereinafter referred to as the "Premises"). The Premises is owned and managed by the Defendants. According to Plaintiff, she was at the Premises visiting her daughter for a few weeks in anticipation of her daughters wedding. Her daughter lives on the second floor of the Premises which is a two family dwelling. The Plaintiff contends she was descending the steps with a trash bag in her left hand, that she got to the fourth step from the bottom and slipped. Plaintiff contends that as she was slipping she grabbed at the rail on the right, but it was too close to the wall and she was unable to grasp it. At first Plaintiff testifies that she slipped on a ripped carpet but later clarifies that it was a flap, that was not "glued down" and caused her to slip.

Law and Application

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center*, 64 NY2d 851 [1985].) Summary judgment eliminates cases from the Court's trial calendar which can be properly resolved by the Court as a matter of law (*Andre v Pomeroy*, 35 NY2d 361 [1974]). As summary judgment is a drastic remedy, it should not be granted where there is doubt about the existence of any issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

"As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property." (*See Calabro v Harbour at Blue Point Home Owners Assn., Inc.*, 120 AD3d 462 [2d Dept 2014].) Defendant has the burden of demonstrating prima facie that it did not create the hazardous condition, and did not have actual or constructive knowledge of the condition for a sufficient length of time to remedy it (*see Levine v G.F. Holding, Inc.*, 139 AD3d 910 [2d Dept 2016]; *Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011]). To meet its initial burden on the issue of constructive notice, defendant must offer evidence as to when the area in question was last cleaned or inspected in relation to the time that plaintiff fell. (*See Lauture v Board of Managers at Vista at Kingsgate, Section II*, 172 AD3d 1351 [2d Dept 2019]; *Ahmetaj v Mountainview Condominium*, 171 AD3d 683 [2d Dept 2019]; *Baez v Willow Wood Assocs., LP*, 159 AD3d 785 [2d Dept 2018].) "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discover and remedy it." (*See Williams v NYCHA*, 119 AD3d 857 [2d Dept 2017]; *see also Adamson v Radford Mgmt. Assocs.*, 151 AD3d 913 [2d Dept 2017]; *Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011].)

Defendant Zadie Bradley testified that she would do a visual inspection of the premises every month when she visited the premises to collect the rent. Zadie testified that she did not observe any defect with the stairs.

Building Code Violation

Defendants' expert Rudi O. Sherbansky ("Sherbansky") submitted an affidavit in support of Defendants' position. Sherbansky's investigation included, among other things, a review of: applicable building codes, experience inspecting stairs, deposition testimony of the parties, the Bill of Particulars, photographs of the site and a site visit on September 21, 2017. Sherbansky states, Plaintiff's initial allegations that the handrail's proximity to the wall and the absence of two handrails as opposed to one constituted violations of the 1968 Building Codes are false. According to Sherbansky the Premises was built in 1915 therefore as per Section 27-105 and 27-11 of the 1968 Building Code the construction of the house including the stairs is "grandfathered" as it was built prior to 1938. Moreover, Sherbansky opines that the applicable building codes from 1910 -1916

contain provisions for stairs that are inapplicable to two family dwelling houses, like the premises. Therefore, Defendants' expert alleges the stairs were in compliance with the building codes and did not constitute a hazardous condition.

Plaintiff's expert Stanley Fein ("Fein") submitted an affidavit in support of Plaintiff's position. Fein's investigation included a review of: the Bill of Particulars, a photograph of the stairway, deposition testimony of the parties and the Defendants expert witness Sherbanky's affidavit. Fein did not conduct a site inspection because both the handrail and the subject carpet were replaced post-accident but prior to Fein's investigation. Fein argues that the Defendants' violated the 1910 Building Code specifically Section 1028 which allegedly states a handrail shall not be less than 34 inches nor greater than 28 inches above the tread nosing. Also, according to Fein the 1910 Building Code states there should be a distance of 1 1/4 inches between the handrail and the wall. Fein opines, Sherbansky measured the handrail to be 32 ½ inches above the stair nosing and 3/4 inch away from the wall which constitutes a violation of the 1910 Building Code. Fein refers to Zadie's deposition testimony where she states the premises was gutted and renovated between 2011 or 2012 and 2017 including replacement of the carpet on the stairs at issue. In sum, Fein concludes the type of carpeting was contraindicated for the stairway unless it was completely nailed and glued down (which Plaintiff's testimony suggests it was not) and that the handrail was improper in that there was not sufficient space to grab it.

Plaintiff alleged the Defendants have not properly set forth the facts necessary to prove that the Premises was "grandfathered". According to Plaintiff, if the costs of the gut renovations that took place between 2011 or 2012 and 2017 exceeded thirty percent of the value of the building the building would need to be in compliance with current Building Code provisions. Plaintiff argues the "self serving affidavit" from Zadie which states that she "made no major renovations or alterations to the premises the cost of which exceeded at any time thirty percent of the value of the building for a twelve month period" was insufficient proof.

Defendants argue the 1910 Building Code that Fein refers to is non-existent. However, Mr. Sherbansky refers to "Section 151 of the 1910-1916 Building Code of NYC". Furthermore, this Court finds that the affidavit from Zadie and the Experts reassurance amount to insufficient proof that the Premises retains its status as "grandfathered". Nonetheless, the Court need not resolve these issues because Defendant's have failed to establish prima facie entitlement to judgment as a matter of law

Condition of the Stairs

De-Minimus

Defendants rely on their experts affidavit to support their allegation that the alleged defect was de- minimus. According to Sherbansky, "trivial carpet movements by carpet wrinkles or flaps that occur due to material imperfections or due to normal wear and tear are not inherently dangerous to walk on". Defendants refer to Section 1009.31 of the 2008 NYC Building Code which states in

part the tolerance between the largest and smallest riser or between the largest and smallest tread shall not exceed .375 inch in any flight above the stair tread surface. Sherbansky recorded stair dimensional tolerances at the relevant sites to be .25 inch or less.

In *Losito v. JP Morgan Chase & Co.* (72 AD3d 1033, 1034 [2d Dept 2010]) plaintiff alleged she tripped and fell on a crack on a concrete platform step. The defendant moved for summary judgment claiming the defect was trivial. A property owner may not be held liable for trivial defects that do not constitute a trap or nuisance (*id*). In *Trincere v. County of Suffolk* (90 NY2d 976, 978 [1997]) the court held "a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable." The court should analyze "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury"(*id* [internal citation omitted]). The *Losito* court found that defendant established prima facie entitlement to summary judgment because the defect was trivial (*Losito* at 1034). Plaintiff testified that the crack was half an inch wide however, photographic evidence provided by plaintiff contradicted plaintiff's testimony and indicated no elevation differential (*id*).

Here, this Court lacks the information necessary to determine whether the defect was de-minimus or trivial. While the above quoted 2008 NYC Building Code § 1009.31 provides guidance to this Court as to the acceptable standards there is no per se rule surrounding what shall and shall not constitute a defect on a stair case. Here, the carpet was plain and brown, there is no suggestion that it contained distracting patterns (see *Marita Czarnecki v Scotto Bros Enterprises Company n/k/a TVD brothers LLC, et al.*, 2017 NY Misc Lexis 5719, *4 [January 25, 2017, No: 601365/2015]) and Zadie testified she visually inspected the carpet monthly. On the other hand, arguably the alleged defect is not one that can be discovered upon visual inspection. The shifting or moving of the carpet on a stair case is a physical experience mere photographs depicting leveled slabs are insufficient to depict whether the carpet on the stair case was properly attached.

Creation of the Hazardous Condition

Defendants have not established prima facie that it did not create the alleged hazardous condition. Defendant testified as follows:

Q: From approximately 2012 until 2017 was there a particular reason why that apartment was vacant?
A: The entire building was re-gutted. It was not livable. (Page 13 lines 12-16)

Q: You had indicated that as part of that– Im going to refer to it as a project if that's okay with you, part of the project the carpet was repaired; is that correct?
A: Repaired. You said carpet was repaired?
Q: Was the carpet repaired as part of that?
A: It was not repaired it was replaced. (Page 17 lines 16-24)

Q: How was the carpet attached to the stairs?

A: I don't know.
Q: Did the use glue, did they use tack a combination of both?
A: Tacks were involved.
Q: Was there an glue involved?
A: I don't know. (Page 19 lines 10-20)

Defendants are unable to confirm how the carpet was adhered to the stair case. While Zadie testified tacks were used she is unable to confirm whether glue was used. Defendants have not presented enough evidence to establish prima facie that it did not create the hazardous condition.

Constructive Notice

Plaintiff testified that she arrived at the Premises some time in July of 2017. Plaintiff testified as follows:

Q: Prior to the accident, do you know how many times you had gone up and down those steps to leave Tiffany's apartment and enter before the accident?
A: That was my first time going down the steps that day.
Q: That day?
A: Ah-ha.
Q: But you indicated that you arrived around July 20th?
A: Ah-ha
Q: So do you remember about how many times you would go from Tiffany's apartment on a daily basis, an estimate?
A: About two times a day. (Pages 14-15 lines14-25 and 2-4)

Q: When did you first feel the carpet move on the step where your accident happened before the accident?
A: Before the accident?
Q: Yes. When was the very first time?
A: Every day that I walked up an down the steps.
Q: But when was the first time you experienced that, how long before your accident was it? Was it that day, a week before?
A: Weeks prior.
Q: About how many?
A: Two. (Page 36 lines 6-18)

Defendant Zadie testified that she conducted routine inspections of the carpeting on the stairs, which included ensuring that the stairs were kept clear. Zadie testified that she would ensure the carpet was not ripped or loose by using her "Naked eyes". Zadie could not recall the exact date of the last time she visited and inspected the Premises prior to Plaintiff's accident. However, it was Zadie's routine practice to perform these inspection when she went to the Premises in the beginning

of the month to collect rent. Zadie testified she lacked actual notice of any defect because while she could not point to any record keeping method related to complaints, she received no complaints about the carpet on the stair or the handrail prior to the accident.

Q: Prior to the date of the accident had you ever noticed any part of either the steps themselves or the riser between the steps having any bulging carpet?
A: No. (Page31 lines 6-10)

"A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discover and remedy it." (*See Williams v NYCHA*, 119 AD3d 857 [2d Dept 2017]; *see also Adamson v Radford Mgmt. Assocs.*, 151 AD3d 913 [2d Dept 2017]; *Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011].) In consideration of Plaintiff's allegation that she felt the carpet shift every time she traversed the steps, that she first began to feel it two weeks prior to her fall coupled with Defendants' testimony that Zadie inspected the steps at least once a month when she would collect the rent in the beginning of the month, Defendants have not established prima facie that they lacked constructive notice of the alleged condition. Therefore it is,

ORDERED, that Defendants' motion for summary judgment is denied in its entirety.

The foregoing constitutes the decision and Order of this Court.

Dated: November 4, 2019

Hon. Chereé A. Buggs, JSC

FILED
NOV 18 2019
COUNTY CLERK
QUEENS COUNTY