

Dakis v Federal Realty Ltd. Partnership

2019 NY Slip Op 33799(U)

November 26, 2019

Supreme Court, Queens County

Docket Number: 716977/2017

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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GEORGE DAKIS, Index No.: 716977/2017

Plaintiff, Motion Date: 11/21/19

- against - Motion Nos.: 12 & 13

FEDERAL REALTY LIMITED PARTNERSHIP, Motion Seqs.: 3 & 5
IHSAN WILLIAMS, MARVIN L. REID and
ESTATES NY REAL ESTATE SERVICES LLC,

Defendants.

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The following electronically filed documents read on these motions (seq. nos. 3 & 5) by defendants FEDERAL REALTY LIMITED PARTNERSHIP (hereinafter Federal Realty) and ESTATES NY REAL ESTATE SERVICES LLC (hereinafter Estates NY) for an order pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety and with prejudice:

	<u>Papers</u>
	<u>Numbered:</u>
Notice of Motion (seq. no. 3)-Affirmation-Exhibits...EF	58 - 68
Affirmation in Opposition-Exhibits.....EF	88
Notice of Motion (seq. no. 5)-Affirmation-Exhibits...EF	90 - 102
Affirmation in Opposition-Exhibits.....EF	103
Reply Affirmation-Exhibits.....EF	104 - 105

This is an action for damages for personal injuries allegedly sustained by plaintiff on May 27, 2016 as a result of a trip and fall inside the premises located at 97-77 Queens Boulevard, Rego Park, New York 11374.

This action was commenced by the filing of a supplemental summons and amended complaint on December 7, 2017. Defendants joined issue by service of an answer on December 29, 2017. Plaintiff alleges that the subject steps were negligently designed, repaired, constructed and maintained. Federal Realty and Estates NY (collectively hereinafter defendants) now move for summary judgment on the ground that the subject steps were not hazardous as a mater of law.

Initially, this Court notes that the two motions are nearly identical, with the exception of the transcript of Christopher Bassignani dated September 25, 2019. Mr. Bassignani's deposition was taken after defendants' made the first motion for summary judgment. Plaintiff argues that the second motion for summary judgment is untimely and should not be considered. However, as this Court permitted defendants to supplement the initial summary judgment motion and as the second motion is made on nearly identical grounds as the timely motion, Mr. Bassignani's testimony will be considered herein (see Ellman v Village of Rhinebeck, 41 AD3d 635 [2d Dept. 2007]; Grande v Peteroy, 39 AD3d 590 [2d Dept. 2007]).

Plaintiff appeared for an examination before trial on October 3, 2018, and testified that on the date of the accident, he was working as a real estate broker on behalf of Dakis Homes 4 U. He went to Kings and Queens Realty (hereinafter Kings and Queens) to pick up a key to show a building. He was wearing leather slip-ons with a rubber sole. He arrived at the subject premises between 4:00 p.m. and 5:00 p.m. The date of the incident was the first time he had gone to Kings and Queens. Prior to the incident, he opened the door to enter the premises and was able to see clearly. He was not holding anything and was looking straight ahead. Nothing impaired his vision. His right foot got caught on a step. He lost his balance, lunged forward, did not land or fall. There was no handrail to grab. His left leg went out straight and he caught himself. After he caught himself, a lady that was working at the office asked him if he was okay. He told her that he was in a lot of pain. The lady then said "this happens all the time". After the incident, he did not make a formal complaint or fill out an incident report. He never went back to Kings and Queens after the incident. At his deposition, plaintiff identified photographs that fairly and accurately depicted the building and steps in the year 2016.

Carmelo Rivera appeared for an examination before trial on behalf of Federal Realty on December 12, 2018, and testified that he is the superintendent. He has been employed by Federal Realty since 2010. He is responsible for maintenance and repair. The subject premises is a commercial building comprised of thirteen floors. Kings and Queens was a tenant in May 2016. He has been inside the unit occupied by Kings and Queens approximately fifty times. If an accident happens, the tenant should report it to Federal Realty. He never noticed any problems with the entrance and/or interior steps of Kings and Queens Realty. He never received any complaints regarding the entranceway and/or steps. He never had any issue entering or exiting Kings and Queens.

Prior to the subject incident, Federal Realty never received any complaints regarding the entranceway and/or steps. He never had any issue entering or exiting Kings and Queens. At his deposition, Mr. Rivera was shown the same photographs plaintiff was shown at the time of his deposition and indicated that the photographs depict a step and a landing.

Christopher Bassignani appeared for an examination before trial on behalf of Estates NY on September 25, 2019, and testified that he is the property manager and has been employed by Estates NY since March 2009. The subject premises has always been a commercial building. In May 2016, Kings and Queens was a tenant. He was familiar with the entrance to Kings and Queens as he visits the property two to three times a month. There are two stairs, and they have rubber treads. He has never received any complaints pertaining to the front steps in Kings and Queens. He personally never had any issue entering or exiting Kings and Queens. The vestibule area had adequate lighting.

In support of the motion, defendants submit an expert affidavit from David E. Behnken, P.E., an engineering consultant. Expert Behnken identifies the materials he reviewed prior to executing his affidavit. Expert Behnken also conducted a site inspection on January 19, 2019. Expert Behnken opines that he has reviewed no information by which to conclude that the handrail requirements contained within the 1938, 1968 or 2008 Building Code are applicable to the single tread, two-rise subject staircase. He further opines that the absence of a handrail was not causally related to plaintiff's fall as plaintiff was able to regain control after he allegedly tripped and began to fall. Expert Behnken concludes that the subject incident was not due to any shortcoming or impropriety on the part of Federal Realty, but rather was due to plaintiff's own inattentiveness to his surroundings. Expert Behnken further concludes that had plaintiff made reasonable observations along his intended path of travel, his incident, in all probability, would not have occurred.

Based on the submitted evidence, defendants contend that summary judgment must be granted as there is no evidence that a defective or dangerous condition existed on the stairs, the cause of the subject incident is based on mere speculation, and defendants did not have notice of the alleged defect.

In opposition, plaintiff submits an affidavit dated August 27, 2019. Plaintiff affirms that on the date of the subject incident, he entered the property and was caused to trip and fall when his right foot caught the tiny and shallow first step located inside the property. This caused him to lose his

balance and begin to fall face first. As he fell, he looked and reached for a handrail to steady himself and prevent his fall, but the staircase did not have any handrails. Both of his hands were free at the time of his fall. Had there been a handrail available, he would have been able to reach it to steady himself and prevent his fall. As there was no handrail available, he was forced to prevent his fall by catching himself straight legged with his left leg.

Plaintiff also submits an expert affidavit from Robert Fuchs, P.E., a professional engineer. Expert Fuchs identifies the materials reviewed prior to executing his affidavit. Expert Fuchs opines that the stair is concealed when entering Kings and Queens, thereby posing an inherent hazard to pedestrians. The stair is not equipped with handrails as is required by the building code. The concealed condition of the stair and the absence of handrails are the defects that contributed to plaintiff's incident. Expert Fuchs opines that Expert Behnken incorrectly asserts that the stair is readily perceptible and that it does not require handrails. Expert Fuchs states that he found the presence of relatively new finishes within the tenancy to be consistent with the space having been renovated. Based on such, there is evidence that the tenancy is not original, and thus, Expert Fuchs contradicts Expert Behnken's opinion that the tenancy is original and dates back to 1964-1965 when the building was constructed.

Based on the evidence submitted in opposition, counsel for plaintiff contends that there are triable issues of fact as to whether defendants caused or created the defective condition or had actual or constructive notice of the alleged defective condition.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]). A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Bruk v Razag, Inc., 60 AD3d 715 [2d Dept. 2009]). 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's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]). "To meet [its] initial burden on the issue of lack of constructive notice, [the defendant] must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Birnbaum v New York Racing Association, Inc., 57 AD3d 598 [1986]; see Przywalny v New York City Tr. Auth., 69 AD3d 598 [2d Dept. 2010]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Braudy v Best Buy Co., Inc., 63 AD3d 1092 [2d Dept. 2008]).

Here, in support of their motion, defendants submitted plaintiff's deposition testimony in which he testified that a woman working at the office who was there to give plaintiff a key asked plaintiff if he was okay and stated "this happens all the time" (Plaintiff Dep. 37:20-25). Viewing the evidence in the light most favorable to the non-moving party, this Court finds that the evidence submitted by defendants is insufficient to demonstrate, prima facie, that defendants did not have constructive notice of the alleged defective condition prior to plaintiff's incident.

Moreover, contrary to defendants's contentions that the cause of plaintiff's fall is speculative, plaintiff specifically testified that as he walked in his "right foot caught a tiny step, which [he] didn't see, [he] wasn't able to grab a rail or anything, [he] didn't see any way of catching [himself] other than falling face-first, which [he] didn't, [he] caught himself straight legged on the left leg and [he] felt a pop in [his] knee" (Plaintiff Dep. 28:16-22).

As defendants failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of plaintiff's opposition papers (see Giraldo v Twins Ambulette Serv., Inc., 946 NYS2d 871 [2d Dept. 2012]; King v 230 Park Owners Corp., 95 AD3d 1079 [2d Dept. 2012]; Hill v Fence Man, Inc., 78 A.D.3d 1002 [2d Dept. 2010]).

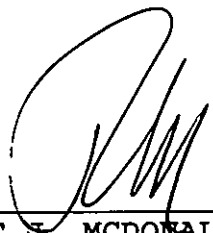
In any event, based on the conflicting expert affidavits, issues of fact, including, but not limited to whether the subject stairs were a hazardous condition and whether the stairs violated New York City and New York State building codes, preclude summary judgment (see O'Brien v Port Authority of New York and New Jersey, 29 NY3d 27 [2017]; Heberer v Nassau Hosp., 119 AD2d 729 [2d Dept. 1986]) ["The weight to be afforded conflicting testimony of experts is a matter peculiarly within the province of the

jury"]; Shields v Baktidy, 11 AD3d 671 [2d Dept. 2004]; Gleeson-Casey v Otis E. Co., 268 AD2d 406 [2d Dept. 2000]; Guzman v Saks Fifth Ave. Corp., 141 AD2d 801 [2d Dept. 1988]).

Accordingly, and for the above stated reasons, it is hereby

ORDERED, that defendants FEDERAL REALTY LIMITED PARTNERSHIP and ESTATES NY REAL ESTATE SERVICES LLC's motions (seq. nos. 3 & 5) are denied.

Dated: November 26, 2019
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

FILED
DEC - 2 2019
COUNTY CLERK
QUEENS COUNTY