Arias v Fountain House, Inc.
2020 NY Slip Op 34066(U)
December 11, 2020
Supreme Court, New York County
Docket Number: 155983/2018
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH — *Justice* PART IAS MOTION 14

---X

MIGDALIA ARIAS

Plaintiff,

- v -

FOUNTAIN HOUSE, INC.,

Defendant.

---X

INDEX NO. 155983/2018

MOTION DATE 12/09/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 66, 67, 68, 69

were read on this motion to/for JUDGMENT - SUMMARY .

The motion by defendant for summary judgment is denied.

Background

This slip and fall case concerns a stairway located at a building owned by defendant. Plaintiff claims that as she was descending a staircase from the first floor to the basement, her right foot slipped on the third step from the bottom which caused her to fall. Plaintiff contends that the fall was caused by stair itself, which was purportedly made of smooth granite and lacked any non-skid friction strips or anything else to prevent a fall. Plaintiff asserts that the Building Code requires treads on stairways to have nonskid material and that defendant did not show it complied with this provision.

Defendant moves for summary judgment and claims that there was no defect in the stairs and, even if there was, it did not have the requisite notice required to hold it liable under a negligence theory. It attaches the affidavit of its expert who claims that the stairway in question was sufficiently slip resistant (NYSCEF Doc. No. 57 at 4).

In opposition, plaintiff attaches the report of its expert who claims that he inspected the stairs and found that defendant failed to provide a non-skid stair tread surface (NYSCEF Doc. No. 67 at 1). He insists that the stair was a large, smooth granite surface and it lacked any friction or texture that could make it "non-skid" (*id*. at 3).

In reply, defendant asserts that plaintiff's reliance on a Building Code violation does not raise an issue of fact. It points out that plaintiff testified she had used this staircase about two times a week and never had an issue with it.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably

conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"It is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages for a breach of this duty, a party must establish that the landlord created, or had actual or constructive notice of the hazardous condition which precipitated the injury. Moreover, in order 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 [the owner's] employees to discover and remedy it" (*Zuk v Great Atl. & Pac. Tea Co.*, Inc., 21 AD3d 275, 275-76, 799 NYS2d 504 [1st Dept 2005] [internal quotations and citations omitted]).

Here, the Court denies the motion. The fact is that plaintiff submitted an expert's affidavit that raised an issue of fact (*Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440, 906 NYS2d 528 [1st Dept 2010]). In *Babich*, the First Department found an issue of fact in a slip and fall on a staircase involving the same Building Code violation raised here (27-375[h]) where the plaintiff's expert visited the site and concluded the surface was extremely slippery (*id.*). The expert affidavit provided by plaintiff in this case details that he inspected the staircase at issue, felt the surface and concluded it did not have the requisite nonskid material as required under the subject Building Code provision. Although defendant's expert disagreed, plaintiff's expert provided a nonconclusory opinion about the subject staircase. The Court cannot choose which

expert to believe on a motion for summary judgment where both sides present adequate expert reports.

A jury must decide if there was sufficient tread on the stairs; it must consider whether it believes plaintiff's version that the stairs lacked tread, were too slippery and constituted a dangerous defect or defendant's account that the stairs were fine, there was sufficient tread and there was no defect that caused plaintiff's accident. And if there was a defect, a jury could also conclude that defendant had constructive notice of the defect—the slippery staircase—and that it must have existed for some time prior to the accident.

Here, plaintiff clearly identified the cause of her fall as the slipperiness of the stair (NYSCEF Doc. No. 54 at 29, 77). This is not a case where it is unclear what caused plaintiff to fall; she testified that the step was simply a surface that was "too slippery," she lost her balance and broke a bone in a fall.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is denied.

12/11/2020			ARLENE P. BLUTH, J.S.C.	
DATE				
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