Velez v Pagan
2021 NY Slip Op 33030(U)
November 30, 2021
Supreme Court, Bronx County
Docket Number: Index No. 21908/2018E
Judge: Theresa M. Ciccotto
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At IAS Part 22 of the Supreme Court of the State of New York, held in and for Bronx County, on the 30th day of November 2021.

PRESENT: HON. THERESA M. CICCOTTO
Justice of the Supreme Court

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DYLLON VELEZ,

Plaintiff,

-against-

MIREYA PAGAN,

Defendant.

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Index No. 21908/2018E

Motion Seq. #2

DECISION /ORDER

RECITATION, AS REQUIRED BY CPLR§ 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	.....
ANSWERING AFFIDAVITS	...3-4.....
REPLY AFFIDAVITS	..5.....

UPON THE FOREGOING CITED PAPERS, THE COURT FINDS AS FOLLOWS:

Defendant moves for an Order pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff's Complaint in its entirety. Plaintiff opposes.

Background:

Plaintiff seeks to recover damages for an ankle fracture he allegedly sustained on December 12, 2017, as a result of his falling on an interior set of steps at the premises located at 732 Union Avenue, Bronx, New York, due to a broken handrail The premises is a three family house owned by Defendant, who resided on the third floor of same. At the time of the accident, Plaintiff was

visiting a friend, "Ken," who resided on the second floor. Plaintiff alleges that he was descending the staircase between the second and first floors when the handrail along the staircase, suddenly became detached from the wall causing him to fall.

Plaintiff subsequently commenced the instant suit via a Summons and Complaint on February 16, 2018. Issue was joined via service of Defendant's Verified Answer on April 26, 2018. Defendant contends that Plaintiff's Bill of Particulars and Supplemental Bill of Particulars make "general, boilerplate assertions with regard to the condition of the steps inside the premises.... Further, plaintiff's Supplemental Bill of Particulars, dated May 21, 2021,....for the first time raises allegations of various building code violations, the majority which are inapplicable to this action. There is no evidence that the defendant had actual or constructive notice of any problems concerning the handrail in question" (Aff. In Support of Motion, pp. 2-3, ¶6).

Positions of the parties:

Defendant argues that she is entitled to judgment as a matter of law because she did not create or have notice of any defect with the handrail in question. Defendant testified that no work was ever performed on the staircase during the time that she owned the subject premises. She points out that her deposition testimony is actually corroborated by Plaintiff's own testimony wherein he testified that he did not observe any construction or repair work being performed on the subject staircase during his more than 100 visits to the premises.

Defendant also testified that she personally inspected the staircase on a regular basis and at no time prior to the incident, was she aware of any problems, complaints or violations with regard to said handrail or the staircase. Moreover, during his 100 visits to the premises, Plaintiff never complained about the handrail to anyone associated to the premises. Defendant argues that even if the handrail was defective, no evidence exists to demonstrate how long the defect existed before the

incident. As such, Plaintiff is precluded from relying on a theory of constructive notice as such determination is highly speculative. Moreover, she argues that Plaintiff has failed to demonstrate through the use of expert opinion, that a defective condition existed with the handrail which resulted in the accident.

Defendant further argues that there are no credibility determinations to be made because the record unequivocally establishes that she did not create or have notice of the alleged defective condition prior to the alleged subject incident. Additionally, Defendant argues that since Plaintiff has failed to raise a question of fact, she has conclusively established her entitlement to judgment as a matter of law.

Plaintiff argues that Defendant has failed to present any evidence to support her argument that she did not cause or have actual or constructive notice of the broken handrail. Plaintiff also argues that to meet her initial burden on the issue of lack of constructive notice, Defendant must proffer some evidence as to when the area in question was last cleaned or inspected relative to the time when the Plaintiff fell. He argues that in the instant case, while Defendant testified that Anibal Pagan, the superintendent, would "come to the building everyday" (Plaintiff's Exh "B," p. 13, L15-24), and that his duties include "everything that was needed" (*id.*, p. 13 L. 6-14), Defendant fails to annex an affidavit of Mr. Pagan to support her claim of lack of actual or constructive notice.

Plaintiff also argues that Defendant fails to annex inspection reports conducted by either Mr. Pagan or herself to indicate when the handrail and the area around it was last cleaned or inspected. Plaintiff further argues that for notice to be classified as constructive, the alleged defect must have been visible and apparent, and it must have existed for a sufficient length of time prior to the accident, to permit a defendant to discover and remedy the condition. Moreover, Plaintiff argues that Defendant fails to submit any evidence regarding the installation, maintenance or repair of the

handrail to undermine the theory of negligence. He points out that Defendant's statement alone that she "'glued' the handrail with metal 'just fine,' "permits the influence of negligent repair" (Opp., p. 5, ¶15).

Plaintiff lastly argues that the litany of issues raised by his submissions are more than sufficient to defeat the instant motion.

Conclusions of law:

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324-325 [1986]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 [1979]).

"[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman,* 49 N.Y.2d at 562). It is the duty of the court not to test the sufficiency of the pleadings, but rather to go behind them to the very substance of the action and distinguish matters of law from matters of fact, material issues of fact from immaterial ones (see *Wanger v. Zeh*, 45 Misc.2d 93, 94 [Sup. Ct. Albany Co. 1965]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (see *Gaines v. City of New York*, 8 Misc.3d 968, 971, 2005 N.Y. Slip Op. 25246 [Sup. Ct., Bronx Cty. 2005]; *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 [1978]).

"To establish a prima facie case of negligence, the plaintiffs must demonstrate (1) that the

defendants owed them a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach" (*Huth v. Allied Maintenance Corp.*, 143 A.D.2d 634, 635 [2d Dept. 1988]; citing, *Boltax v. Joy Day Camp*, 67 N.Y.2d 617, 619-620 [1986]; *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027-1028 [1985]). It is well-settled that an owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition (see *Aberger v. Camp Loyaltown, Inc.*, 193 A.D.3d 195, 199 [1st Dept. 2021]; citing, *Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]). Furthermore, "[t]o establish negligence in this type of slip-and-fall case, a plaintiff must demonstrate, *inter alia*, that the defendant breached its duty to the plaintiff by either creating a dangerous condition or, because it had actual or constructive notice thereof, failing to remedy the situation" (*Kesselman v. Lever House Restaurant*, 29 A.D.3d 302, 304 [1st Dept. 2006]).

In the case at bar, the Court finds that Defendant has failed to establish an entitlement to summary judgment. Indeed, Defendant relies solely on deposition testimony when the submission of affidavits were also necessary to support her position (see *Rodriguez v. New York Housing Authority*, 304 A.D.2d 468 [1st Dept. 2003]; *Garcia v. Good Home Realty, Inc.*, 67 A.D.3d 424 [1st Dept. 2009]; *Hartman v. Mountain Valley Brew Pub, Inc.*, 301 A.D.2d 570 [2d Dept. 2003]).

Issues of fact exist that are more appropriately reserved for a jury's determination.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED: that Defendant's motion is denied in its entirety.

This constitutes the decision and order of the Court.

DATED: November 30, 2021

ENTERED:

Theresa M Ciccotto

Hon. Theresa M. Ciccotto
JSC