

Altschuler v Gramatan Management, Inc.

2004 NY Slip Op 30104(U)

November 16, 2004

Supreme Court, New York County

Docket Number: 0011223/2002

Judge: Saralee Evans

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Saralee Evans

PART 10

0112230/2002

ALTSCHULER, LUCILLE
vs
GRAMATAN MANAGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 2

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision of November 17, 2004*

FILED

NOV 23 2004

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/16/04

Saralee Evans

Check one: FINAL DISPOSITION

SARALEE EVANS J.S.C.
 NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
LUCILLE ALTSCHULER,

Index No. 112230/02

Plaintiff,

-against -

DECISION, ORDER
And JUDGMENT

GRAMATAN MANAGEMENT, INC., 280-90
COLLINS OWNERS CORP., DAFFY'S INC.,
BUILTLAND PARTNERS and D & D
ELEVATOR MAINTENANCE INC.,

Defendants.

-----X
HON. SARALEE EVANS, J:

Recitation, as required by CPLR § 2219[a], of the papers considered in review of this motion by defendants Daffy's Inc and Builtland Partners for summary judgment dismissing the complaint.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Reply Affirmation.	3

Upon the foregoing cited papers, the Decision/Order on this Motion and Cross Motion is as follows:

Plaintiff fell as she was entering Daffy's store at 335 Madison Avenue and sues the store and the building owner, alleging violations of the Building Code and common law negligence.

Plaintiff testified at her deposition that she fell after she opened a second set of doors leading into the store from the street. She took two or three steps into the store looking straight ahead and fell, fracturing her leg. After her fall as she lay on the floor, she first noticed a step down from the entryway level to the selling floor. She further testified that there was no one else in the

entryway entering or leaving the store at the time.. She did not trip or slip and guessed that she fell because “the step was not visible.”

In the complaint and Bill of Particulars, plaintiff alleges noncompliance with several provisions of the New York City Building Code as well as common law negligence. Discovery having been completed, defendants Daffy’s and building owner Builtland Partners each move for summary judgment dismissing plaintiff’s action.¹

The code provisions set forth in the Bill of Particulars and in plaintiff’s expert report provide, in relevant part that, in a corridor or an exit passageway where there is a change in level requiring less than two risers, the change shall be by a ramp rather than a step. These provisions were enacted in 1968. The building at issue was constructed in 1905. Plaintiff does not contend that the step at issue violates the Building Code in effect in 1905, but asserts that renovations to Daffy’s entryway in 2000 render the step subject to the newer code provisions.

Defendants urge that plaintiff has not set forth *prima facie* evidence of either a building code violation or of common law negligence. Defendants’ expert states in his affidavit that the step inside the entrance to Daffy’s complies with the relevant provisions of the applicable 1905 Building Code, that no violations were ever issued with respect to the step, and further that it in complies with industry safety recommendations in that cautionary signs are posted on the entryway doors and the step displays three yellow stripes marking its surface and edge. Photographs appended to plaintiff’s expert report also reveal handrails on either side of the step.

Store manager Antonia Pappas testified at her EBT that she has worked at Daffy’s in that

¹The other named defendants were sued as a result of an unrelated incident. That cause of action has previously been removed to Supreme Court, Westchester County.

capacity for eleven years. She described the store's entryway noting that there were signs on the exterior doors saying, "watch your step." According to Pappas, the marble floor is greenish grey and there is a taupe colored mat on the upper landing. That mat ended before a row of three yellow stripes that run along the step and Ms Pappas testified that there is the same type of matting on the floor below the step.

Ms. Pappas stated that Daffy's had used that entrance since 2000 Daffy's took over the space vacated by a neighboring store. Ms. Pappas at first testified that no changes were made to the entrance. She later referred to a renovation wherein Daffy's put in new doors. She further stated that she was aware of no other accidents with respect to the step.

Defendants contend that the Building Code provisions referenced by plaintiff do not govern here. The statement of their expert to that effect is bolstered by a printout of City records, showing that the only building permit filed was the New Building permit and certificate of occupancy issued in 1905. Under NYCRR §27-105, unless major renovations are made that post date passage of building code provisions, buildings built before the effective date of the code are grandfathered under the old law. The expert, a licensed engineer, also stated that there are no violations of the old code, and that the entrance and stair complied with industry safety standards in that the stair had handrails, the edge was marked in yellow stripes, and there were warning signs posted, and the step had adequate illumination. American Society for Testing and Materials, F 1637 6.2.2 . Defendants thus contend that they have no no statutory liability.

In opposing the motion, plaintiff offers the affidavit of her expert. He states that the building is subject to code provisions enacted in 1968 requiring ramps instead of steps. Plaintiff's expert also states that plaintiff tripped and fell as she was entering the store, that mats

placed on the higher and lower surfaces were of the same color at the time of the accident, that if the three yellow lines running along the step were covered by the mat the step would be camouflaged, and that there was no handrail. Based on those assumptions, plaintiff's expert concludes that the raised platform was unsafe in a manner that significantly contributed to causing plaintiff's accident.

The Applicable Code

NYCRR §27-115 subjects a building to the requirements of the new code if the cost of alterations in one year exceeds 60% of the value of the building. Under §27-116, if the cost of alterations shall be between 30% and 60% of the building's value, the altered portions of the building must be brought up to code.

Defendant having gone forward with prima facie evidence that the building was grandfathered out of the 1968 building code provisions, the burden falls to plaintiff to demonstrate that it is covered in an exception to §27-105. *Sanchez v. Biordi*, 259 AD2d 434 (1st Dept. 1999); *Hyman v. Queens County Bancorp, Inc.*, 307 AD2d 984 (2d Dept. 2002). Plaintiff contends that renovation of the premises brought the entrance within the confines of the new code. She offered no evidence as to the claimed renovation, however, except the testimony of Antonia Pappas.

The nature of the renovation as described by Ms. Pappas indicates that the glass doors were replaced. She does not state or even suggest that the step was built or renovated. Neither party presented any evidence of the value of alleged the renovation. The witness for the building's owner testified, however, that Daffy's tenancy comprises a relatively small portion of the ground floor of 335 Madison Avenue. It is simply impossible that replacement of the entry

doors would raise an issue with respect to the new building code. Defendants are therefore entitled to summary judgment dismissing the claim of statutory liability.

Common Law Negligence

Defendants further claim that they are also entitled to summary dismissal of plaintiff's allegations of common law negligence. The issue of whether a dangerous condition exists "depends on the peculiar facts and circumstances of each case" and is generally a question of fact for the jury. *Schechtman v. Lappin*, 161 AD2d 118, 121 (1st Dept. 1990). Moreover, plaintiff's engineer has opined that other allegedly unsafe conditions contributed to causing plaintiff's accident in addition to the alleged Building Code violations. "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment." *Diaz v. New York Downtown Hospital*, 99 NY2d 542, 544 (2002).

Reviewing the record cited by the expert, there is no evidence of the additional unsafe conditions on which he relies for his opinion. From Ms. Pappas' testimony that the mats on the upper and lower portions of the floor were of the same type, the expert segues to the conclusion that they were of the same "composition" and then that they were the same color, despite photographs provided with his 3101(d) exchange showing mats of contrasting colors. He speculates without any basis that the mats might have covered the cautionary striping at the top of the steps. He further opines that visibility of the warnings on the entry doors differs under unspecified light conditions without stating what those conditions are or whether they existed at the time plaintiff fell. He also asserts that the stair lacked handrails despite the fact that handrails are visible in the photographs provided with his report..

On the motion, plaintiff's lawyer affirmed that plaintiff "stumbled over the step."

Plaintiff's expert stated that she "tripped and fell". Plaintiff herself testified, "I opened that second set of doors and took two steps and fell." No one else was entering or leaving the store at the time, and plaintiff testified that as she entered she looked straight ahead into the store and did not notice the step. She further stated "I had no idea how I fell and how this could have happened - and I turned around to look and that is when I saw there was a step there." When asked what caused her to fall plaintiff stated, "I guess the step was not visible."

In response to defendants' motion, plaintiff offers only the affidavit of her expert. The law is clear that "when an expert's affidavit [is] proffered as the sole evidence to defeat summary judgment [it] must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor." *Romano v. Stanley*, 90 NY2d 444, 451 (1997). Here, the affidavit of plaintiff's expert fails to set forth a basis for liability, nor is there any indication on the record that facts exist that would support the conclusion set forth. In light of the foregoing, the court declines to reach the issue of whether Builtland Partners' status as an out of possession landlord would insulate it from liability.

FILED

NOV 23 2004

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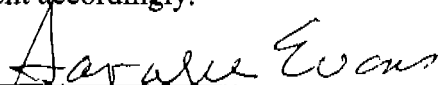
For the foregoing reasons, defendants' motion is granted and it is hereby

ORDERED that defendants' motion for summary judgment is granted.

is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 16, 2004
New York, NY


Saralee Evans, J.S.C.

HON. SARALEE EVANS