Bates v West 128th Street, L.P.

2007 NY Slip Op 31680(U)

June 12, 2007

Supreme Court, New York County

Docket Number: 0106163/2005

Judge: Shirley W. Kornreich

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SCANNED ON 6/19/2007

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

PRESENT: Shirley Werner Kornreich, *Justice* — **PART** 54

Batec v.

- v -

West 128 St., LP

INDEX NO. 106163/05
MOTION DATE 3/15/07
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for preclude & dismiss + papers submitted in Motion Seq. 002

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

FILED
JUN 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 6/12/07

HON. SHIRLEY WERNER KORNREICH, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
---X
ESTELLE BATES,

DECISION & ORDER

Plaintiff,

-against-

Index No.: 106163/05

WEST 128TH STREET, L.P., and THE
NEIGHBORHOOD PARTNERSHIP HOUSING
DEVELOPMENT FUND COMPANY, INC.,

Defendants.
---X
SHIRLEY WERNER KORNREICH, J.

Motion Sequences 001 and 002 are hereby consolidated for disposition.

Motions Before the Court

Defendants move in motion sequence 001 to preclude plaintiff from offering the testimony of Scott Perry as a trial witness and to dismiss plaintiff's claims relating to an accident that occurred on April 19, 2004 ("Stair Accident").

Defendants move in motion sequence 002 for summary judgment. Plaintiff cross-moves to consolidate the two motions and for partial summary judgment on the issue of whether the Americans with Disabilities Act, 42 USC 1282 et seq. ("ADA"), the Architectural Barriers Act of 1968, 42 USC 4151-4157 ("ABA"), the Uniform Federal Accessibility Standards, 24 CFR 40 ("UFAS") and New York City Local Law No. 58 (LL 58), are applicable as a standard of care, in addition to common law negligence.

Factual Background

On October 1, 2002, Plaintiff rented Apartment 1B ("Apartment"), in the building located

at 27 West 129th Street, New York, New York ("Building"). Defendant West 128th Street, LP, ("Owner") acquired title to the Building pursuant to a deed dated March 11, 2004, from defendant Neighborhood Partnership Housing Development Fund Company, Inc. ("Neighborhood"). The lease for the Apartment, signed by plaintiff on October 14, 2002 ("Lease"), ¶24, states that: "Tenant has inspected the Apartment and the Building. Tenant states they are in good order and repair and takes the Apartment as is except for latent defects." Plaintiff admitted at her deposition that she read the Lease before signing it.[1]

It is undisputed that at the time plaintiff leased the Apartment, she was a paraplegic confined to a wheelchair. It is also undisputed that the Building entrance was accessible only by stairs, that it lacked a ramp for wheelchair access, and that the entrance to plaintiff's kitchen was not wide enough to accommodate a wheelchair while opening the oven.

1. The Stair Accident

Plaintiff alleges that the Stair Accident occurred when Scott Perry ("Perry"), a neighbor, fell due to a loose step on the stairs leading from the Building to the street. Plaintiff testified that the step was frequently loose. She said that, on the day of the accident, her home health aide, Evancy Harry ("Harry"), and Perry were carrying her downstairs in her wheelchair. Perry was holding the top of the wheelchair and Harry was holding the bottom. Plaintiff avers that, "Mr. Perry exclaimed that the step was loose and he lost his balance."

Harry's testimony confirmed that the "stair was loose and Scottie lost control...." Harry said that when she stepped on the step earlier that day "it was shaking...." According to Harry,

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[1] The landlord named in the Lease is 128th Street Cluster Associates, which is not a party to the action.

the loose step was the at the landing or the step below it and Perry "had to be at the top so he walked on the loose step." She also stated that the day of the accident was not the first time she had noticed that step loose. She said that, "[o]n occasions before when the step is loose they come and fix it. Then it gets loose again and they fix it again." Harry claimed that she had been present when plaintiff called to complain about the step and when plaintiff showed the superintendent that it was loose.

A second home health aide, DeJoris Foster ("Foster"), testified that, in her presence and after plaintiff moved to the Apartment, plaintiff requested a ramp and complained about cracks in the stairs. Foster said that she had noticed the cracks when taking plaintiff down the stairs, that plaintiff complained about them a lot, that they were fixed and then they cracked again. Foster said this happened every couple of months. According to Foster, plaintiff complained about the cracks and asked for a ramp in a conversation with the superintendent and the landlord, whose names Foster did not know.

Steven Garel ("Garel"), plaintiff's friend, also appeared for a deposition. He checked the steps after the Stair Accident and found "a slab that was a bit loose." He also said that he had noticed the loose step before the Stair Accident, had experienced problems carrying plaintiff down the stairs and would try to stay to the side of the step where it was "the most solid part of the stairs."

2. The Oven Accident

Plaintiff alleges that she had a second accident on April 25, 2004 ("Oven Accident"), while she was basting meat in her oven. She claims that the accident occurred because the doorway to her kitchen was not wide enough for her wheelchair and the surface of the floor separating the living room from the kitchen was inappropriate for a wheelchair. As a result, she was just outside the kitchen when her wheelchair slid backward as she reached to close the oven, causing her to fall on the floor. Her friend, Garel, testified that he had seen plaintiff use the oven. His description was that plaintiff could not position her wheelchair to face the oven because of limited space, so she would open it from the side while leaning forward. Garel picked plaintiff up after her fall and observed the oven door partially open.

Procedural History

In an order dated November 22, 2005, the court set a note of issue deadline of May 17, 2006 and summary judgment motion deadline of July16, 2006, or 60 days after filing the note of issue, whichever was later. On July 6, 2006, the court changed the deadlines to August 31, 2006 for the note of issue and October 3, 2006 for summary judgment motions.

The note of issue was filed on August 31, 2006. On October 3, 2006, the last day of the deadline, defendants filed a motion for summary judgment, sequence 002. Plaintiff cross-moved for partial summary judgment on January 5, 2007.

After the note of issue was filed, defendants served a subpoena to compel the deposition of Perry as a non-party witness and a notice for his deposition. Perry never appeared in response to the subpoena, but defendants never made a motion to hold Perry in contempt. Plaintiff alleges that Perry passed away in December 2006. On December 8, 2006, defendants moved to preclude

the trial testimony of Perry and to dismiss the action insofar as it was based on the Stair Accident. The ground for the motion is that without the testimony of Perry, there is no evidence that a loose step caused him to drop plaintiff's wheel chair.

Discussion

A. Standard of Review

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law. *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). A failure to make such a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (First Dept. 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*, 49 N.Y.2d, at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

B. Defendants' Motion

Defendants' motion for summary judgment is denied. Contrary to defendants' assertions, plaintiff has tendered sufficient evidence in admissible form to raise issues of fact as to whether the Stair Accident happened when Perry stepped on a loose step, which plaintiff allegedly had complained about to both the superintendent and the landlord prior to the accident. The home health aides, Garel and plaintiff have all submitted evidence, which if believed by the trier of fact, would permit an inference that Perry exclaimed that the step was loose as he fell, that he stepped on it because he was at the top of the stairs, that defendants' had notice of the loose step months before, that plaintiff complained about the step, and that defendants tried but failed to repair it properly. In addition, there is evidence that plaintiff suffered injuries as a result of the fall.

With respect to defendants' reliance on the lease clause stating that plaintiff accepted the premises "as is," there is no proof that the step was loose when plaintiff signed the Lease and there is proof that complaints allegedly were made after the Lease was executed. Therefore, defendants have not shown that plaintiff accepted the Apartment knowing there was a loose step.

However, with respect to the Oven Accident, pursuant to the terms of the Lease, plaintiff accepted the Apartment "as is," including the surface of the floor and the size of the kitchen. Accordingly, defendants are entitled to summary judgment dismissing plaintiff's cause of action based on the Oven Accident.

C. Plaintiff's Cross-Motion for Summary Judgment

The court may not consider an untimely cross-motion for summary judgment unless the cross-motion is based on grounds nearly identical to the timely motion to which it responds.

Grande v. Peteroy, 833 N.Y.S.2d 615, 2007 NY Slip Op 3098 (2nd Dept. 2007)(n.o.r.); *see also, Brill v. City of N.Y.*, 2 N.Y.3d 648 (2004); *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725 (2004). Thus, plaintiff's cross-motion relying upon the ADA, the ABA, the UFAS and Local Law 58 cannot be considered because defendants' motion did not raise the applicability of those provisions.

D. Motion to Preclude & Dismiss

The motion to preclude Perry's testimony obviously is moot now that he is deceased. Moreover, there is no basis to sanction plaintiff as she had no control over Perry, defendants never moved to hold Perry in contempt and defendants did not serve him with a subpoena until after the note of issue was filed. Furthermore, as the motion to dismiss based upon lack of evidence is essentially a belated summary judgment motion, the court may not consider it. *Brill v. City of N.Y., supra*; *Miceli v. State Farm Mut. Auto. Ins. Co., supra*. In any event, Perry's outcry in regard to the loose step may be considered as *res gestae* or an excited utterance. *Prince-Richardson on Evidence*, 11th Ed., © 1995, §§8-604-8-608. That statement together with the timing of the fall provide sufficient evidence of causation to raise a triable issue of fact. Accordingly, it is

ORDERED that plaintiff's cross-motion to consolidate motion sequences 001 and 002 is granted; and it is further

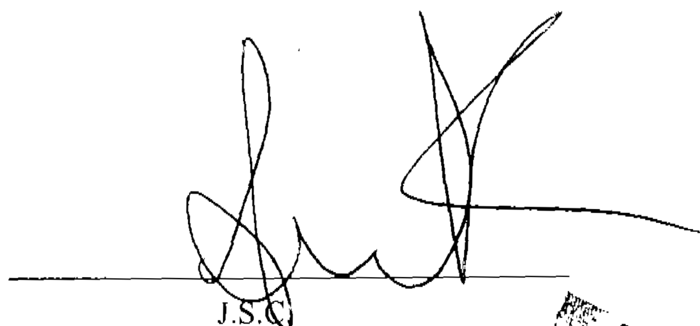
ORDERED that defendants' motion for summary judgment to dismiss the complaint is granted solely to the extent that plaintiff's cause of action for damages based upon the accident of April 25, 2004 is dismissed and in all other respects the motion is denied; and it is further

ORDERED that defendants' motion to preclude is denied; and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference in Room 1227, 111 Centre Street, New York, New York, on June 28, 2007 at 11:00 a.m.

Dated: June 12, 2007



J.S.C.

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