

Sierra v 3rd Ave. Realty Assoc. Inc.

2007 NY Slip Op 33770(U)

November 16, 2007

Supreme Court, New York County

Docket Number: 0109217/2005

Judge: Louis B. York

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

PRESENT: York
Justice

PART _____

Index Number : 109217/2005
SIERRA, LUIS
vs
3RD AVENUE REALTY ASSOCIATES
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 109217/2005
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
NOV 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/16/07

Ley
LOUIS B. YORK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: 1AS PART 2

-----X

LUIS SIERRA,

Plaintiff,

-against-

Index No.: 109217/2005

DECISION/ORDER

3RD Avenue Realty Associates Inc.,

Defendant.

-----X

LOUIS B. YORK, J.S.C.:

In the case at hand, plaintiff Luis Sierra alleges that he sustained personal injuries when he fell in the stairwell of his apartment building. Defendant owns and controls the building where the accident occurred. According to the complaint, deposition transcript and other evidence submitted in connection with this motion, plaintiff states that he fell when his foot caught on a loose metal edge of the fourth step. Accepting the facts as they are asserted by the plaintiff, the steps had metal edges held down by nails and the nails on many of the steps were loose. As a result, the edges became raised, resulting in the condition that caused his accident. He says that the steps have been poorly maintained for the 37 years he and his wife have resided in the building, and that he had complained about their condition on a number of occasions.

It appears, from the parties' arguments here, that the staircase currently is in a condition of good repair. Apparently, plaintiff asserts that this is true only because defendant has made subsequent repairs. Defendant argues that it has not made any repairs because the staircase has

always been in a fine, and safe, condition.

Now, defendant moves for summary judgment dismissing the complaint. Defendant relies on the affidavit of one of its employees, the building superintendent, James Marino. Mr. Marino states that plaintiff did not complain about the steps; that he did not notice any problems with the steps; and that no repairs had been made to the steps since the alleged accident took place. In addition, defendant submits the affidavit of its expert.

Defendant also points to a few excerpts from the deposition transcript. For example, at one point plaintiff states that a particular photograph of the steps – a photograph which does not show any defect – looks the same as the steps at the time of the accident. For another, plaintiff states that metal edges today – which apparently are not raised – is the same as the metal edges on the steps at the time of the accident. For yet another, plaintiff states that in the 37 years he has lived in the building “they never fix anything.” Dep. at p 72. Defendant points to various other statements, which allegedly show that there have not been any defects on the steps and that, at any rate, plaintiff did not provide notice to defendant of the alleged condition. To the extent that plaintiff’s testimony suggests otherwise, defendant contends that it is the result of plaintiff’s counsel’s “interruptions throughout the deposition,” which were designed to “elicit more favorable responses from his client.” Aff. in Support of Motion, at ¶ 20.

Plaintiff’s counsel, in opposing the motion, states that it is defendant which “does its best to try and twist the facts of plaintiff’s testimony” Aff. in Opp., at ¶ 13. He points to portions of the deposition which contradict defendant’s current argument. In these portions, plaintiff says that he observed the problems with the steps, that there were never any attempts to repair them, and that he orally reported the problem to a representative of defendant on a number

of occasions.

“On a motion for summary judgment, the court's function is to determine whether material factual issues exist, not to resolve such issues A motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” Baker v. D.J. Stapleton, Inc., 43 A.D.3d 839, -, 841 N.Y.S.2d 382, 383 (2nd Dept. 2007)(citations and internal quotations omitted). To prevail, therefore, the proponent of the motion must show that it is entitled to judgment as a matter of law. Carpenter v. Morrette, 36 A.D.3d 1115, 1116, 829 N.Y.S.2d 246, 247 (3rd Dept. 2007).

Based on the evidence before the Court and in light of the standard above, there is an issue of fact as to whether defendant kept the steps in adequate repair. The excerpts quoted by defendant do not provide an accurate picture of the deposition testimony. For one thing, there are inaccuracies. For example, instead of stating that he never complained orally about the building, plaintiff states, at page 70 of the transcript, that he did complain. For another, plaintiff has contradicted himself at times; defendant’s counsel selects those answers favorable to it, but there are other answers that suggest ongoing problems with the stairs and also suggest defendants had notice. These inconsistencies create issues relating to the credibility of the testimony, the accuracy of plaintiff’s recollection and observations, and the like, but are not a sufficient basis for summary judgment. See Yaziciyan v. Blancato, 267 A.D.2d 152, 152, 700 N.Y.S.2d 22, 22-23 (1st Dept. 1999). Indeed, if the Court were to grant judgment to either side, it would be deciding these credibility issues, which is improper at this juncture. See Auble v. Doyle, 38 A.D.3d 1264, 1265-1266, 832 N.Y.S.2d 715,716 (4th Dept. 2007).

Another persistent problem is that plaintiff was deposed in English, which is his second language. In general, plaintiff seemed to follow the questions and to answer intelligently. However, there were numerous cases in which plaintiff clearly did not understand the question and other instances in which the language of plaintiff's answers confused defendant's counsel. See, e.g., Dep. at p. 18 (exchange about eye drops and drugstore); id. at p. 20 (exchange about cane); id. at p. 26 (exchange about whether plaintiff recalled having the alleged accident); id. (mistaken use of word "May" for "March"); id. at p. 30 (exchange including discussion of "the one four step"). Some of the answers on which defendant relies seem to involve similarly confused exchanges. Because of this frequent confusion, the court is especially reluctant to grant judgment based on the testimony.

The Court notes that, at the beginning of the deposition, plaintiff was asked whether he was comfortable being deposed in English. He stated, "I speak Spanish, but English I don't speak too well. . . . If I had somebody else to translate just case I don't know your questions it's better for me." Id. at p. 6. Nevertheless, the deposition was held without an interpreter. Had an interpreter been present, the confusion might have been avoided. In the future -- including at trial -- counsel for both sides might desire to have an interpreter on hand, either for plaintiff's entire testimony or else on standby, to assist if any problems arise.

As defendant points out, plaintiff's counsel regularly interrupted the deposition, and at some points affected his client's answer. Plaintiff's counsel's participation in the deposition was, at the very least, overzealous; even worse, at a few junctures, counsel asked leading questions of his client. From a reading of the transcript, it does not appear that in this, plaintiff's counsel meant to manipulate the testimony as much as to clarify defendant's questions; his purpose, it

appears, was to assist his client, clarify his client's answers, or re-ask questions that he believed plaintiff had misunderstood. However, this conduct – interrupting defense counsel's examination and advancing his own questions of his client – is patently improper. Adams v. Rizzo, Index No. 0008469/2004, 13 Misc. 3d 1235(A), 831 N.Y.S.2d 351(table)(Sup. Ct. Onondaga County Nov. 13, 2006)(avail at 2006 WL 3298303). Instead, if counsel felt his client did not adequately understand the questions or clearly relate his own testimony, he should have discussed this concern with opposing counsel – perhaps suggesting that the deposition be halted and resumed with an interpreter. At any rate, wherever plaintiff's counsel asked leading questions, the responses should be – and, for the purpose of this motion, have been – disregarded. Even so, the court finds that plaintiff's unaided answers create issues of fact concerning the condition of the stairs at the time of his fall.

Defendant also uses other evidence in support of the motion. The affidavit and deposition of defendant's expert and employee, respectively, offer evidentiary support that a jury may find credible. However, defendant's evidence is not dispositive concerning the condition of the stairs at the time of the accident. The expert's examination occurred after the accident, in preparation for this lawsuit; and, while this does not render his comments suspect, it does show that he has no personal knowledge of the condition of the steps at the time of the accident. Moreover, his statement that there were no building code violations concerning the staircase also relates to the condition of the staircase at the time of his inspection. His statement that he believed no repairs have been made since the accident are speculative and are based in part on his understanding of Mr. Sierra's testimony about the condition of the steps. However, as stated below, there are problems with the clarity of the testimony and obvious language barriers which


render the testimony less reliable. It is up to the jury to determine whether Mr. Marino's statements are credible to the extent that they contradict the statements of Mr. Sierra. Moreover, the employee's deposition is of evidentiary support but also not dispositive, instead creating issues of fact proper for consideration by a jury at trial.

The court has considered all of the parties' arguments, even if not discussed in this decision. Accordingly, it is

ORDERED that the motion is denied.

ENTER:

Dated: 11/16/07



Louis B. York, J.S.C.
LOUIS B. YORK
J.S.C.

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