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

PRESENT: PART 11

Index Number : 113440/2004
REYES, BEATRIZ
VS
192ND STREET REALTY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	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 annexed Memorandum Decision/Order

FILED
FEB 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: February 7, 2008

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: IAS PART 11

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BEATRIZ REYES,

Plaintiff

Index No.: 113440/04

-against-

192ND STREET REALTY, LLC and ULTRA HOLDINGS CORP.,

Defendants

----------X

JOAN A. MADDEN, J.

In this personal injury action, defendants move for summary judgment dismissing the complaint against them, and plaintiff opposes the motion. For the reasons set forth below, the motion is denied.

Background

Plaintiff seeks damages for personal injuries she sustained on May 16, 2003, when she tripped and fell on an allegedly defective step at an apartment building located at 600 West 192nd Street, New York, New York ("the building"). The building is owned and maintained by defendants 192nd Street Realty, LLC and Ultra Holdings Corp. (hereinafter referred to as "defendants").

Plaintiff testified at her deposition that the accident occurred at approximately 8:00 a.m. on May 16, 2003, after she completed a 12- hour shift as a home health care aide for one of the tenants in the building. According to plaintiff, the accident happened as she was descending the marble stairway leading from the second to the first floor of the building, and she slipped and fell when she put her left foot down on a broken portion of a step, causing her to fall down

backwards to the bottom of stairway. (Plaintiff's dep. at 25, 26). Plaintiff described the step at issue as "cracked" and containing broken area on the left side close to the handrail. (Id. at 23-24). In addition, when asked if a portion of the step was missing, plaintiff responded "yes." (Id. at 22). Upon reviewing the photographs of the step taken a few days after the accident, plaintiff confirmed that the light colored areas where the step was repaired were a slightly different height and were relatively depressed compared to the surrounding areas, and that the darker area of the photograph show "cracked broken and missing pieces." (Id. at 43).

The building's superintendent, Miguel Grullon ("Grullon"), testified at his deposition that sometime around 2001 or 2002, the step at issue, which was the fifth step, was broken when someone threw a soda bottle from the top of the staircase. (Grullon dep. at 25). When asked to describe what he meant by "broken," Grullon testified that the step "was cracked and loose" and "it moved a little bit." (Id., at 26). According to Grullon, Ramon Valentine, who works for him, repaired the step by taking a piece of marble out and putting it back in again. (Id. at 25, 28). Grullon testified that the repair was made using a material similar to plaster and silicone, and that the supplies were taken from his house. (Id. at 28). He also testified that he had not heard anything about anyone other than plaintiff falling on the step. After viewing a photograph of the step taken after plaintiff fell, Grullon agreed the step looked like it did in the photograph after the repair was done.

Defendants move for summary judgment dismissing the complaint on the grounds that there is no evidence to show that defendants had actual or constructive notice of any defective condition, or that they created any defect. In support of their motion, defendants rely on the deposition testimony of Grullon that the step was repaired prior to the accident and that he was

not aware of any prior incidents involving the step.

Defendants also rely on the expert report of Jeffrey J. Schwalje, who is a licensed professional engineer. Mr. Schwalje, who visited the accident site and inspected the stairs on May 1, 2007, opines that the step at issue "did not create a hazard for persons using the stairway in a normal expected manner." In his report he indicates that the step "contains a repaired area [and that] [h]oles in the tread have been patched with white epoxy [and] the tread exhibited several cracks along the left side descending." The report also indicates that "[t]he patched area is flush with the marble tread surface [and that] "the tread possessed a coefficient of friction (slip resistance) of 0.5 within code requirements."

Plaintiff counters that the record is sufficient to raise a triable issue of fact as to whether the defendants negligently repaired the step. In support of her opposition, plaintiff relies on her own deposition testimony, the testimony of Grullon, and the expert affidavit of Stanley H. Fein, a licensed professional engineer. Mr. Fein opines that he inspected the stair on June 20, 2007, and notes that on the fifth step there was "a silicone epoxy patch repair." According to Mr. Fein his testing of the step in a dry condition revealed it had a coefficient of friction of 0.4, and that according to ASTM [i.e. American Society For Testing and Materials] standards "[g]ood and accepted engineering safety practices would require that the slip resistence of a surface be at least 0.7 to ensure its safety under all conditions [and that] [s]ection 27-375 (h) if the New York City Construction Code requires that steps and landings of steps be built of non-skid materials." Mr. Fein than opines that "based upon a reasonable degree of engineering certainty, ...the silicone epoxy patch on the fifth tread of the stairway was improper and defective and constituted a danger and a slipping hazard in that the patch was not made with slip proof material and its

surface below even the marginal requirement of safety."

In reply, defendants argue that the court should disregard Mr. Fein's affidavit as plaintiff failed to disclose information regarding her expert in response to defendants' request for such disclosure and plaintiff has filed her note of issue. Furthermore, defendants assert that even if the affidavit is considered, Mr. Fein's opinion is not probative since he visited the site more than three years after the accident and provides no specific industry standard to support his statement regarding proper co-efficient of friction for step. Defendants also submit a reply affidavit from Mr. Schwalje, who states that the epoxy patches and existing trend have a coefficient of 0.5 and friction co-efficient of 0.5 or greater is considered by the American Society For Testing and Materials as a slip resistant.

Discussion

On a motion for summary judgment, the proponent must "must make a prima facie showing of entitlement to judgment as a matter law" by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. Winegrad, v. New York University Medical Center, 64 NY2d 851, 853 (1985). Once the proponent has made this showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that triable issues of fact exist. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

"Is it well established that a landowner (or possessor of property) is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk [citations omitted]." O'Connor-Miele v. Barhite & Holzinger, Inc.,

234 AD2d 106 (1st Dept 1996). In order for an owner to be held liable for injuries caused to a person as a result of a defective condition on the premises, it must be shown that " the owner or possessor either created the condition, or ha[d] actual or constructive notice of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 AD2d 572, 573 (2nd Dept 2000).

In support of their motion, defendants point to Grullon's testimony that step at issue was repaired, and that he did not have any knowledge of any accidents on the step before plaintiff fell. Defendants also rely on their expert's opinion that the step was slip resistant and not otherwise hazardous. Assuming *arguendo* that defendants have submitted evidence sufficient to establish prima facie proof that the step was not defective, and that defendants had no actual or constructive knowledge of the defect (see Aquila v. Nathan's Famous, Inc., 284 AD2d 287 (2001) citing Maldonado v. Su Jong Lee, 278 A.D.2d 206 (2000)), summary judgment is not appropriately granted as plaintiff has met her burden of presenting proof from which it can be inferred that defendants negligently repaired the step. In particular, it is undisputed that the defendants, through their superintendent, had the step repaired and that plaintiff fell after the repair was done. Moreover, plaintiff testified that at the time she fell, the step was cracked, broken, and uneven, and the photographs taken shortly after the accident support her testimony. See Grossman v. Amalgamated Housing Corp., 298 AD2d 224, 225 (1st Dept 2002)(plaintiff's affidavit and photographs were sufficient to raise a triable issue of fact as to whether defect in sidewalk was created by defendant's negligent repair).

Next, contrary to defendants' position, even though plaintiff failed to respond to defendants' request for expert disclosure, plaintiff's expert affidavit is properly considered as

there is no evidence that the plaintiff's "failure to disclose was intentional or willful and there is no showing of prejudice" to defendants. Hernandez-Vega v. Zwanger-Pesiri Radiology Group, 39 AD3d 710, 711 (2d Dept 2007); see also Busse v. Clark Equipment Co., 182 AD2d 525 (1st Dept 1992).

Next, the court finds that the expert affidavit relied on by plaintiff is sufficiently detailed and based on facts in the record to support plaintiff's position that the step was defective. In addition, while the inspection by plaintiff's expert occurred about four years after the accident, the inspection by defendant's expert occurred at about the same time, and thus the probative value of the opinion of both experts is subject to challenge at trial. In any event, the record contains sufficient evidence of the step's defective condition based on plaintiff's deposition testimony and the photographs of the step to warrant the denial of summary judgment even in the absence of the opinion by plaintiff's expert.

Conclusion

In view of the above, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that a pre-trial conference shall be held on March 20, 2008 at 2:30 pm in Part 11, room 351, 60 Centre Street, NY, NY.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: February 7, 2008

J.S.C.