

Miller v Memadet Realty Corp.

2008 NY Slip Op 30658(U)

March 3, 2008

Supreme Court, New York County

Docket Number: 0101507/2006

Judge: Shirley W. Kornreich

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

JUDGE SHIRLEY WERNER KORNREICH

PRESENT: _____

PART 54

Index Number : 101507/2006

MILLER, SCOTT

vs

MEMADET REALTY CORP

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 11/15/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-4

5

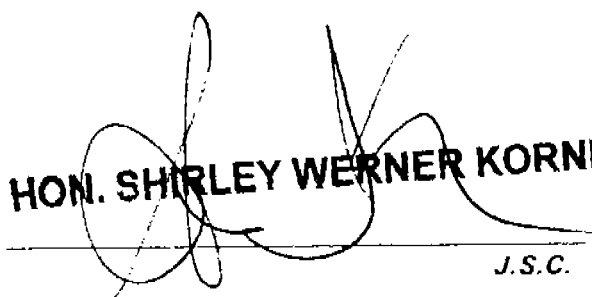
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 10 2008
NEW YORK COUNTY CLERK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: March 3, 2008


HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
SCOTT MILLER,

Plaintiff,

-against-

MEMADET REALTY CORP.,

Defendant.
-----X

SHIRLEY WERNER KORNREICH, J.

Index No. 101507/06

DECISION & ORDER

FILED
MAR 10 2008
NEW YORK
COUNTY CLERK'S OFFICE

In this action for personal injuries arising from a fall on an interior staircase, the defendant, Memadet Realty Corp., moves for summary judgment dismissing the complaint. The ground for the motion is that there is no evidence that defendant either created or had actual or constructive notice of the conditions that allegedly caused plaintiff to fall.

Factual Background

Plaintiff alleges that, on August 16, 2005¹, at approximately 1:00 a.m., he slipped on a slippery substance on an intermediate landing in the staircase between the third and fourth floors of a building located at 640 West 153rd St., New York, NY (Building). Defendant's relationship to the building is unclear from the record.²

Plaintiff testified at his deposition that, at the time of the fall, it was 1:00 a.m. and he had just left the apartment of his friend, Lloyd Greaves, a tenant in Apartment D4. Plaintiff said that

¹ The parties entered into a stipulation amending plaintiff's pleadings and bill of particulars to reflect that the accident occurred on August 16, 2005.

² The superintendent employed at the Building on the date of the accident, Andres Martinez, appeared for a deposition on defendant's behalf, but there is no proof in the record as to whether defendant Memadet Realty Corp. is an owner or managing agent of the Building.

the lighting in the hallway was "very dull" and described the lighting in the staircase as "duller" and "barely lit." When asked if he could see the staircase in front of him, he answered, "Yeah, slightly." Plaintiff was unable to identify the substance that he slipped on. He testified that, "I really couldn't see it. Like I said the lighting was bad." Plaintiff also said that Mr. Greaves almost slipped on the substance when he came to plaintiff's assistance after the accident.

On March 15, 2007, plaintiff served a subpoena and notice of deposition to examine Mr. Greaves as a non-party witness. The parties agree that Mr. Greaves did not appear due to his reluctance to take time off from work. See, Defendant's Moving Aff., ¶17. Plaintiff filed the note of issue almost seven weeks later, on May 2, 2007.³ However, Mr. Greaves submitted an affidavit in opposition to this motion, which plaintiff alleges is sufficient to establish notice to defendant of a recurrent dangerous condition consisting of debris on the stairs.

Mr. Greaves' affidavit states that when he went to help plaintiff, he observed on the landing between the third and fourth floors and on several steps, "some type of greasy liquid, that I believe was cooking oil." Mr. Greaves adds that:

This was not the first time I had observed garbage, debris or food on the steps in my building. Over the last several years it seems that more often than not, when I have to use the stairs in my building there is some type of mess on the stairs. There is an elevator in my building that I prefer to use but unfortunately it often breaks down or just takes too long to arrive and I end up using the stairs. On numerous occasions prior to Mr. Miller's accident, I made complaints to the super in our building about the overall cleanliness of the building and I have also complained about the condition of the steps. Specifically, I had complained to the super about: garbage, debris and food being on the steps and remaining there for days at a time.

Mr. Miller's attorney has shown me the deposition testimony from the super in my

³ The Certificate of Readiness is dated April 30, 2007, but the court's records reflect that the note of issue was filed on May 2, 2007.

* 4]

building in which he claims to clean the steps twice daily. He also testified that he had never received any complaints about the stairwell in the building. I must take issue with both of these answers. If the super cleaned the steps twice daily as he stated, then the numerous times that I walked through, over and around garbage on the steps would not have happened. As far as complaints being made about the steps prior to Mr. Miller's accident, I know at the very least one tenant who complained to him, me.

Affidavit of Lloyd Greaves, sworn to on September 12, 2007, ¶¶ 3 & 4.

Discussion

It is well established that a landowner must maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk. *Perez v. Bronx Park S. Assocs.*, 285 A.D.2d 402, 403 (1st Dept. 2001), *appeal den.*, 97 N.Y.2d 610 (2002). In order to recover damages for a breach of this duty, a plaintiff must demonstrate that the landlord created, or had actual or constructive notice of, the hazardous condition that caused the injury. *Id.* To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to allow the owner to discover and remedy it. *Id.* A plaintiff may satisfy the burden of establishing constructive notice with evidence of an ongoing and recurring dangerous condition in the area of the accident that was routinely left unaddressed by the landlord. *Uhlich v. Canada Dry Bottling Co.*, 305 A.D.2d 107 (1st Dept. 2003); *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, 106-107 (1st Dept. 1996). When a landowner has actual knowledge of the tendency of a particular dangerous condition to recur, he is charged with constructive notice of each specific reoccurrence of that condition. *Weisenthal v. Pickman*, 153 A.D.2d 849 (2nd Dept. 1989).

Here, the affidavit of Mr. Greaves is sufficient to raise an issue of fact as to whether the

superintendent had actual notice that there was a recurring problem with food and refuse on the stairs. Plaintiff's testimony also raises an issue of fact as to whether the dimly lit staircase contributed to his inability to see the slippery substance on the landing. Defendants' proof that plaintiff fell because he had been drinking and that the superintendent checked and cleaned the staircase twice daily merely raises issues of fact that cannot be resolved in summary fashion.

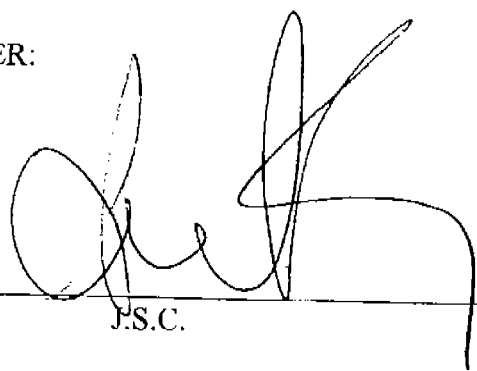
While defendant objects to the submission of Mr. Greaves affidavit because he was never deposed, defendant was made aware that Mr. Greaves was a witness to the accident when plaintiff was deposed on February 26, 2007. Defendant could have noticed Mr. Greaves' deposition and chose not to do so when he failed to appear in response to plaintiff's subpoena, well before the note of issue was filed. In these circumstances, plaintiff is not precluded from submitting Mr. Greaves' affidavit in opposition to the motion for summary judgment. *See, Parra v. 167 Allison Meat Corp.*, 7 A.D.3d 451 (1st Dept. 2004). *Capraro v. Staten Island Univ. Hosp.*, 245 A.D.2d 256 (2nd Dept. 1997), cited by defendant, is inapposite. In *Capraro*, the Court held that the plaintiff's affidavit was insufficient to raise an issue of fact because it contradicted admissions she made during her deposition. In this case, the affidavit of Mr. Greaves does not contradict previous admissions by plaintiff. Accordingly, it is

ORDERED that defendant Memadet Realty Corp.'s motion for summary judgment is denied; and it is further

ORDERED that the parties are directed appear for a pre-trial conference on March 20, 2008, at 9:30 a.m., in Part 54, Room 1227, of the Courthouse located at 111 Centre St., New York, NY.

Dated: March 3, 2008

ENTER:



J.S.C.

FILED
MAR 10 2008
NEW YORK
COUNTY CLERK'S OFFICE