

Sarmiento v C & E Assoc.
2008 NY Slip Op 31078(U)
April 10, 2008
Supreme Court, New York County
Docket Number: 0116230/2004
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 116230/2004
SARMIENTO, JORGE
VS.
C&E ASSOCIATES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/17/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1-3
4-5
(6)

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

APR 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/10/08

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
JORGE SARMENTO and DOLORES SARMIENTO,

Index No. 116230/04

Plaintiff,

DECISION & ORDER

-against-

C & E ASSOCIATES,

Defendant.

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

In this action for personal injuries, defendant moves to renew and reargue its motion for summary judgment. The motion was denied by this court on July 5, 2006. The Appellate Division, in a memorandum decision, dated May 29, 2007 (AD Decision), modified and granted defendant leave to renew on the issue of the applicability of Building Code §27-375(h), having found that defendant had failed to meet its burden of demonstrating the inapplicability of that section. There is no proof in the record as to when that decision was served with notice of entry. Hence, it cannot be determined whether reargument is timely. Familiarity with both prior decisions is assumed and the facts will be repeated only as necessary.

The AD Decision rejected the theory in plaintiff's expert's affidavit on the original motion insofar as it averred that the staircase surface had an insufficient coefficient of friction for the following reasons: 1) the expert did not reference a specific standard requiring a 0.5 coefficient of friction for stair surfaces and treads, 2) he did not establish that he tested the step where plaintiff fell, and 3) he did not state whether the condition of the step at the time of his inspection, nine months after the accident, was the same as it had been at the time of the

accident.

Nevertheless, the Appellate Division ruled that defendant's summary judgment motion was denied because plaintiff reliance on Building Code §27-375(h), which requires treads and landings to be built or surfaced with non-skid materials, raised an issue of fact:

Notwithstanding the above, defendant's motion for summary judgment must be denied on the ground that a triable issue exists as to one of plaintiffs' multiple statutory claims. In plaintiffs' expert's affidavit, the allegation is made that the stairs violated the Building Code, which explicitly requires that "[t]reads and landings shall be built of or surfaced with nonskid materials" (Administrative Code of City of NY § 27-375[h]). There is evidence in the record that the treads of the stairs were made of marble, and had been in that condition for many years prior to the accident.

We find that a triable issue exists as to the applicability of § 27-375(h) (*see Grayson v Hall*, 31 AD3d 606 [2006]). It is defendant's appellate contention that *Sarmiento v. C & E Assoc.*, 40 A.D.3d 524, 527-528 (1st Dept. 2007) §27-375(h) does not apply because the subject building was built in 1916, long before the enactment of the nonskid requirement of the Building Code, and thus, the existing marble stairs were "grandfathered" in under § 27-111 of the Administrative Code. In contrast, plaintiffs argue that there is no conclusive evidence as to the date the building was constructed, and that even if 1916 is the correct year, the building may still be subject to the present Code requirements by virtue of § 27-118(a) of the Administrative Code, which excludes from the grandfathering provision any building that has undergone significant renovations resulting in a change of occupancy group classification.

Having considered these arguments, we conclude that defendant has failed to meet its burden of demonstrating the inapplicability of § 27-375(h) (*see Pappalardo v New York Health & Racquet Club*, 279 A.D.2d 134, 140 [2000]). Although plaintiffs' counsel asked some questions regarding renovations during depositions, and the expert's affidavit gave an approximate year of the building's construction, this issue was never fully aired, presumably due to plaintiffs' late notice of the Code provision in their supplemental bill of particulars and defendant's failure to raise any challenge to its applicability in its reply papers. Accordingly, the motion for summary judgment should be denied, with leave to renew on the issue of the applicability of § 27-375(h) (*cf. Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304 [2006]).

Sarmiento v. C & E Assoc., 40 A.D.3d 524, 527-528 (1st Dept. 2007).

On this motion, the parties' expert affidavits agree that the 1901 New York City Tenement Code, which was applicable prior to the Building Code, also required steps to be built of or surfaced with non-skid materials. This eliminates the issue of fact identified by the Appellate Division.¹

Defendant now has submitted an expert's affidavit that contains photographs and measurements of the staircase where the accident occurred and opines whether they meet the standard set forth in Building Code §27-375(h). There is no excuse offered by defendant for failure to present expert evidence on the earlier motion. However, in keeping with this Department's precedent, defendant's renewal motion will be considered even though defendant did not submit an expert affidavit on the prior motion. *See, Trinidad v. Lantigua*, 2 A.D.3d 163 (1st Dept. 2003)(renewal based on expert opinion "inexplicably" not offered on original motion); *Mejla v. Nanni*, 307 A.D.2d 870 (1st Dept. 2003)(reversing denial of renewal in interest of justice for failure to present excuse for not presenting evidence on original motion); *Security Pac. Natl. Bank v. Evans*, 31 A.D.3d 278 (1st Dept. 2006)(permitting new evidence without proper excuse in exercise of discretion).

Defendant's new expert agrees with the slip resistance standard of 0.5 that plaintiff's expert relied upon in the prior motion, but which the Appellate Division rejected as insufficiently tied to a reference standard, and states that based upon his inspection and testing on August 13, 2007, the slip resistance on the area where plaintiff fell met the standard. He cites ASTM F1637-

¹ Defendant's engineering expert, Erik Reitz, avers that his examination of records of the Building Department revealed that, in 1915, a construction application was filed for the building where the accident occurred. This is hearsay that cannot be considered in support of the motion.

02 - Standard Practice for Safe Walking Surfaces, and National Safety Council Data Sheet I-495 for the English XL VIT (Variable Incidence Tribometer) for testing the step tread. He also said that he consulted three publications, but does not state what they say. He opines as follows:

5. Widely accepted methods exist for evaluating the slip resistance of walking surfaces. These include standards published by the American Society for Testing and Materials (ASTM) such as ASTM F1679 Standard Test Method for Using a Variable Incidence Tribometer.

6. Walking surfaces where the slip resistance is 0.5 or greater are considered to be slip resistant. Our tests, using the English XL VIT, demonstrated that *the second floor and landing tread surfaces* had a slip resistance of 0.7 in the dry condition and when wet the slip resistance lowered to 0.55.

[emphasis supplied]

Mr. Reitz authenticated photographs that are annexed to the motion papers, which were taken at the time of his inspection and thus were not presented to the court on the original motion. In paragraph 9 of his affidavit Mr. Reitz states that, "Mr. Sarmiento stated that he slipped on the tread surface at the second floor entrance to the stairway." Photographs 2 and 3 depict a single step from the second floor hallway down to a landing (Single Step Landing) that leads to a flight of stairs of twelve or thirteen steps. Motion, Exh. F, Photographs 2 and 3. Photograph 8, which bears the caption, "tread on which the reported slip occurred," appears to be the top of the Single Step Landing. Photograph 5 depicts the machine defendant's expert used to measure the "step tread" and "non-slip strips" of the stairs, but it is unclear from the picture which step the machine is testing. Defendant's deposition witness testified that the stairs in the Building had not been repaired since the time defendant bought it in 1999 until the date of his deposition in November 9, 2005. EBT Zev Curanovic, pp. 21, 23 and 40. There is no evidence in the record as to whether the area was the same from the time of Mr. Curanovic's deposition in

2005 until the date of Mr. Reitz's inspection in 2007, two years later.

At his deposition, plaintiff said he fell on the first step down from the second floor, but it is unclear, in light of the photographs submitted on this motion, what he meant by that. Plaintiff testified as follows:

- Q On which staircase did the accident happen at that building?
 A From second to first floor.
 Q When the accident happened, were you going up the stairs or down the stairs?
 A Going down....
 Q To get to [sic] the second floor to the first floor, is there one flight of stairs or more than one flight of stairs?
 A I don't understand the question.
 Q Is there one flight of stairs or is there a break in between?
 A There is a staircase going from the second and then there's a platform in the middle, and there's another small staircase that leads to the first floor.
 Q The stairs that go from the second floor down to the platform, do you know approximately how many steps there are?
 A More or less, 11 or 12.
 Q When you reach the platform and go to the set of steps after that, approximately how many steps are there?
 A Two.
 Q Did the accident happen on the set of steps before the platform or on the set of steps after the platform?
 A From the second to the first on the first staircase.
 Q That's the one that had 11 or 12 steps?
 A Yes....
 Q As you were proceeding down the staircase that had 11 or 12 steps, on which step did the accident occur?
 A Going down the second floor to the first floor, its on the first step.
 Q On the first step down from the second floor?
 A Yes.

Plaintiff's EBT, pp. 16-19. It is unclear from the testimony whether plaintiff identified the place where he fell as the step from the hallway to the Single Step Landing or the top of the Single Step Landing.

In opposition to the motion, plaintiff's expert added to his original affidavit, but he didn't

inspect the stairs again. He opined that several of the marble steps had been replaced, but he did not state which steps had been replaced. He quotes his original affidavit in which he stated that the “Static Coefficient of Friction (SCOF) ... was measured at various locations in the proximal area of this accident and on several treads,” a statement that the Appellate Division held was insufficient to raise an issue of fact because it didn’t say that the step tested was the one where plaintiff fell. Plaintiff’s expert concluded that there is no question that the step that caused Mr. Sarmiento’s fall was not in compliance with slip resistant requirement in the 1901 City of New York Tenement Code and Title 27, Subchapter 6, 27-375(h) of the Building Code. He then added that the first step down from the landing had a worn, rounded nosing.

Discussion

The motion is denied because defendant’s expert failed to eliminate all issues of fact as to whether the step where plaintiff fell was sufficiently slip resistant on the day of the accident. *Sarmiento v. C & E Assoc.*, *supra*, citing, *Santiago v. UA Communs.*, 263 A.D.2d 407 (1st Dept. 1999). Defendant demonstrated the “second floor and landing tread surfaces” had an SCOF of 0.5 or greater in August 2007. The “second floor and landing tread surfaces” would include the step from the hallway to the Single Step Landing and the top of the Single Step Landing. However, defendant failed to come forward with evidence that the conditions were unchanged from 2005, when Mr. Curanovic testified that no changes had been made to the stairs since 1999 until the date of Mr. Reitz’s inspection.

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).

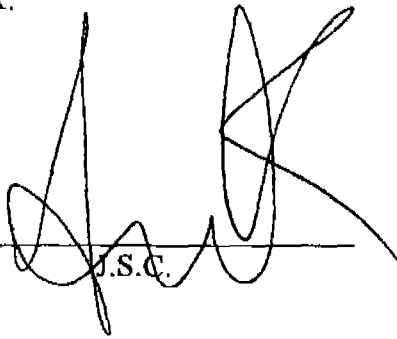
Here, defendant's motion papers were insufficient to eliminate all issues of fact and, therefore, upon renewal, defendant's motion for summary judgment is denied. The remaining arguments raised by the parties have been considered and have been found to be without merit. Accordingly, it is

ORDERED that defendant's motion to renew and reargue its motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on April 24, 2007 at 11:00 a.m., at the Courthouse located at 111 Centre Street, Part 54, Room 1227.

Dated: April 10, 2008

ENTER:


J.S.C.

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