

Martinez v 142 Broadway Assoc., LLC

2008 NY Slip Op 33707(U)

September 5, 2008

Supreme Court, New York County

Docket Number: 118967/06

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

Four pictures of the stairwell are annexed to plaintiff's papers. They show a bannister on one side of the stairwell throughout. There is a second bannister from the lobby floor through the middle of the fifth step; the other steps have a wall opposite the bannister. The staircase has four "winder" stairs – stairs that are extremely narrow at the turn of the bannister and widen as they reach the wall or second bannister. The winder stairs are the fourth, fifth, sixth and seventh steps up from the lobby. One photograph has a ruler laid on what appears to be the length of the sixth step and a second ruler across what appears to be the width of the step. At what appears to be 18 inches from the bannister, the step's short end, the width of the sixth step appears to be approximately 10 inches.

Defendant has submitted an affidavit from Edward R. Quinn, an investigator for E.R. Quinn Co. Mr. Quinn avers that he went to the Building and "took measurements of the step involved in [plaintiff's] accident." Referring to the photograph with the measurements, he states that subject step is triangular in shape, its width is 10 1/2 inches, 18 inches from the stringer and its height is 7 3/4 inches.

Plaintiff testified to the following at her deposition. She had been a resident of the Building since 1992 and was leaving the building on the morning of June 1, 2006 when she fell. The portion of the stairwell upon which she fell has "winder" steps. When she fell, plaintiff was looking down at the steps, which were free of debris, and was holding onto the handrail with her right hand and holding a small bag of garbage in her left hand. The toes of her right foot touched the sixth step from the bottom,¹ and then she slipped. A video camera captured the accident and confirms this testimony. Plaintiff claimed that she fell because "the steps are so small." Prior to the accident, plaintiff had never complained about the steps.

¹ It is unclear from the record on which step plaintiff slipped, since her attorney continually objected when defense counsel tried to elicit this information and would not allow her client to mark any photograph to indicate the step.

B. Plaintiff's Submissions

In opposition, plaintiff submits an affidavit from William Marletta, the principal of Marletta Safety Consultants, who is a Board Certified Safety Professional and has a doctorate in Occupational Safety and Health. Mr. Marletta avers that he interviewed plaintiff and she told him she slipped and fell from the fifth step up from the lobby and that she told him that the steps were changed from their original design. He does not specify the change. He further avers that he inspected the subject stairwell and found that it consisted of eleven marble treads, which wind to the right and have four winding treads (the fourth through seventh steps up from the lobby). He numbers the winders as 1, 2, 3 and 4, without identifying which step each number represents. The measurements of the winders, then, are set forth in charts. The charts indicate that winder 1 is 27 inches wide at its widest part, 1 1/2 inches wide at its narrowest and 9 1/4 inches wide at 18 inches from its narrow end; winder 2 is 27 inches wide at its widest part, 3 inches at its narrowest and 8 inches wide at 18 inches from its narrow end; winder 3 is 27 1/2 inches wide at its widest part, 3 inches at its narrowest and 8 inches wide at 18 inches from its narrow end; and winder 4 is 20 inches wide at its widest part, 2 inches at its narrowest and 6 inches wide at 18 inches from its narrow end. The riser heights are 7 7/8 inches (#1), 8 inches (#2), 8 inches (#3) and 7 3/4 inches (#4). Mr. Marletta avers that a vertical pipe is located at winder #1 and "serves as an improperly designed handrail for winder treads #1,2 & 3." He further states that there is no direct lighting provided for the stair.

Mr. Marletta opines that the Tenement Housing Law of 1909 and good and safe practice require that stairs which are more than 44 inches wide, which these are, require two handrails. In addition, he opines that the winder stairs are too narrow and inadequate for safe placement and support of the foot. Citing to the 1968 Building Code, he states that at 18 inches, the winder

treads must be at least equal to the treads of the stairs above and below them and winders should have, at a minimum 7 inches at any point. Citing to the 1929 Code, he states that the required width of treads must be at least 9 1/2 inches, and citing to the 1909 Code, he states that winding stairs are permitted in a tenement with an elevator, but are required to have at least a 4 inch tread at the curve. Moreover, he opines the stairs required a handrail at each side. Finally, he opines that the handrail provided was too short and useless in case of a fall and that the lighting was insufficient over the stairwell.

Plaintiff also submits three photographs depicting the stairs. She, additionally, submits an internet printout from "<http://propertyshark.com/mason/nyc/Reports2/showsection.html>" which indicates the Building was built in 1909.

C. Defendant's Reply

Defendant's counsel submits an affirmation in which he contends that the photograph defendant submitted with the measurements, was supplied by plaintiff's counsel and that it depicted the stair from which plaintiff fell as having a tread of 10 1/2 inches at 18 inches from the narrow end. He, therefore, argues that Marletta's affidavit, on this issue, is tailored to oppose summary judgment. Moreover, he contends that the internet web page from PropertyShark is hearsay and unreliable since it states that its information is gathered from individuals who subscribe to the site, does not control the contents of the site and does not guarantee the accuracy of the information. Instead, defendant submits a report from Superior Data Services, Inc. which indicates that no certificate of occupancy exists for the building since it was erected before the enforcement of certificate of occupancy regulations. However, the report certifies that government records indicate the building was completed on October 18, 1907, that it is a six-story non-fireproof building with thirty-four apartments. The report is not signed or sworn to.

Conclusions of Law

To obtain summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. CPLR 3212(b). It must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 562-563 (1980). Once a *prima facie* showing of entitlement to summary judgment is made, the burden shifts to the party opposing the motion to show facts sufficient to require a trial of any issue of fact. CPLR 3212 (b); *id.* at 560. *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). "The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form." [citations omitted] *Zuckerman v. New York*, 49 N.Y.2d 557, 562 (1980). Thus, where hearsay evidence is not the only evidence produced, where there is a good excuse for tendering such evidence and where the opposing party submits admissible evidence identifying the witness, the substance of his testimony and how the witness acquired his knowledge, hearsay may defeat summary judgment. *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307, 312 (1972); *Landis v. Beacon Comm'ty Dev. Agency*, 180 A.D.2d 1000, 002 (3d Dept. 1992); *Werthheimer v. N.Y. Prop. Insur. Underwriting Assoc.*, 85 A.D.2d 540, 541 (1st Dept. 1981).

In sum, the court's function on a summary judgment lends itself to "issue finding rather than issue-determination." *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957). In doing so, the court "[is] required to accept the [non-moving party's] pleadings as true and [the

court's] decision must be made on the version of the facts most favorable to the [non-moving party]." *McLaughlin v. Thaima Realty Corp.*, 161 A.D.2d 383, 384 (1st Dept 1990).

Viewing the facts in a light most favorable to plaintiff, defendant's motion must be denied. A material issue of fact exists as to the stairway's compliance with the law, since a dispute exists as to whether the Building was erected in 1907 or 1909. The date the building was completed would govern whether the Tenement Housing Act of 1901, as amended in 1904, or 1909 applies to the case. The evidence produced by both parties is hearsay. Issues of fact also exist as to the size of the treads, the height of the risers, their safety and legality, the propriety of the existing handrail and whether safety and the building code required a second handrail.

Accordingly it is,

ORDERED that the summary judgment motion of defendant 142 Broadway Associates, LLC, is denied.

FILED ENTER:
 SEP 12 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

DATED: September 5, 2008

J.S.C.

