[* 1]

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

PRESENT: HON. CAROL EDMEAD Justice PART 30

Index Number : 100809/2007
GONZALEZ, NIDIA
VS.
191ST STREET ASSOCIATES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/13/09
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

	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

The defendants' motion for summary judgment is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendants 191st Street Associates, LLC and Intervest Development Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiff Nidia Gonzalez, **is denied**; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/18/09

HON. CAROL EDMEAD J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

NIDIA GONZALEZ,

Index No. 100809/07

Plaintiff,

-against-

DECISION/ORDER

191ST STREET ASSOCIATES, LLC and
INTERVEST DEVELOPMENT CORP.,

Defendant.

---x

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants 191st Street Associates, LLC and Intervest Development Corp. ("defendants") move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiff Nidia Gonzalez ("plaintiff").

The plaintiff in this negligence action seeks damages for personal injuries she allegedly sustained on November 24, 2006, after falling on debris on an interior stairway between the fourth and fifth floor at the premises located at 601 West 191st Street, New York New York (the "subject premises").

Plaintiff alleges that the defendants were negligent in failing to properly maintain the stairs, allowing a garbage/debris condition to exist on the stairs and that the handrails were defective. Plaintiff claims that the defendants created the conditions or had actual or constructive notice of the alleged defective conditions. Defendants allowed the stairwell to be littered with refuse which caused a falling hazard and when plaintiff fell as a result of this refuse, the plaintiff tried to steady herself with the handrail but could not since it was not constructed in a contiguous manner and the rail at the point of the plaintiff's fall was lower than the handrail above it.

Plaintiff's Deposition Testimony

Plaintiff's accident occurred on November 24, 2006 at approximately 4:00-5:00 p.m. (p.15). Plaintiff was leaving the subject premises going to the store (p. 16). When plaintiff reached the top of the fifth floor to go down, she took six or seven steps before her accident occurred (p. 25). Plaintiff was holding the first handrail as she was going down the first flight of stairs. However, plaintiff was unable to reach out and grab the second handrail, because it was to low (pp. 26-27). The stairway going down from the fifth floor has a flight of stairs, a landing and another flight of stairs. There is a window on the landing Plaintiff walked down the first flight of stairs, had turned on the landing and had taken two or three steps when she fell (pp. 54-56). On the date of plaintiff's accident, she did not use the elevator because it was not working on that day (p. 32). The elevator was working the morning of her accident because her mother took the elevator. And the elevator was working the day before the accident (p. 69). Plaintiff used the elevator the day before her accident (p. 70).

Plaintiff's fall was caused by trash on the stairs (p. 32). The trash was a bottle of soda, a bottle of water and glass (p. 29), and cigarette butts (p. 48). Plaintiff knows that this is what caused her fall because she saw this debris (p. 33). On other occasions when plaintiff has used the stairs, she has noticed garbage on the stairs (p. 72).

Daily, tenants on every floor leave their trash on the floor in front of the elevator for pick up. However, the trash is put out by tenants all day long. And, there is no designated receptacle for garbage pick up. The garbage is removed by the super or his helper. The garbage is picked up once in the morning (pp. 34-36).

Plaintiff does not know how long the garbage was on the steps before her accident; nor

does she know who put the garbage there (pp. 64-65). Neither plaintiff nor her mother ever complained about garbage being in the building before her accident (p. 65). Plaintiff has no knowledge of anyone ever complaining about the garbage in the stairs (p. 66). Plaintiff is unaware of anyone else falling on the stairs in the building (p. 75).

Deposition of Fernando Donayrez

At the time of plaintiff's accident, he was the superintendent at the subject premises, and he lived in the building (p.6). He worked in the building only part time, and worked at other locations for defendant Intervest (p. 7). At that time he had a helper, William Alamanzar (p. 10). Donayrez' job was to clean the building, and if there were no complaints, he would go work where ever the office sent him (p. 12). Before November 2006, tenants left their garbage in the hallway to be picked up. The garbage was left by their doors of their apartments or in a corner next to the elevator (p. 26). After that date, the building was painted and the rule was changed. Tenants took their garbage outside (pp. 16-17).

The super's routine was that at 7:00 a.m. the super and his helper took the garbage down to the yard (p. 27). It would be taken down by elevator. It was never taken down the stairs. At no time did the garbage from the floors get onto the stairwell (p. 28).

The super's routine was to mop three days a week and the rest of the days sweep. At 7:00 a.m. first the garbage would be removed. Then the cleaning (pp. 28-29).

Before plaintiff's accident, no one ever complained about the handrails (p. 30). No tenants complained to him about garbage on the stairs prior to plaintiff's accident (pp. 29-30). And he never noticed any garbage on the stairs prior to plaintiff's accident (p. 29).

Defendants' Contentions

Plaintiff cannot meet her burden of proof with respect to notice of the alleged dangerous conditions. Moreover, plaintiff cannot identify the exact substances which were allegedly deposited on the step which caused her to slip, the persons who allegedly deposited said substances or the step, nor the length of time that the substances remained on the step prior to her accident. Nor is there any testimony from plaintiff that anything other than the alleged garbage caused her to slip and fall.

Plaintiff's Opposition

Defendants have offered no proof of lack of notice of the trash on the stairwell at the site of plaintiff's accident. Defendants rely solely on the deposition testimony of the superintendent which does not serve to discharge the initial burden. While the super states the general practice of removing garbage beginning at 7:00 a.m. and cleaning the stairs thereafter, there is no evidence as to what cleaning procedures took place on the date of plaintiff's accident, whether or not there was any trash left on the stairs in question or a description of the condition of the stairs when last seen before the accident occurred.

Defendants also leave open the question of how the garbage was taken from the fifth floor without using the stairs even though the elevator was not in service on the date of the accident as claimed by plaintiff.

Besides the issue of notice, plaintiff alleges that the absence of a proper handrail contributed to causing the accident. Plaintiff's engineer, John J. Flynn, P.E., inspected the staircase and found that the steps and handrail violate the building code because the steps are not a non-slip surface and the handrail is discontinuous.

And, the garbage on the steps was a recurring condition, thus creating constructive notice.

Defendants' Reply

The instant case is distinguishable from the cases submitted by plaintiff in opposition to this motion. In the instant case, plaintiff is unable to specify what exactly she slipped on. Further, plaintiff herein is unable to establish the exact cause of her accident and that the condition was, in fact, created by the defendants. There are no types of "footprints" or other evidence showing the existence of the condition in the stairway existed for a long period of time. In fact, plaintiff herein testified that she did not know how long the debris existed in the area or who even put it there.

The superintendent herein established that he and his helpers had a set schedule and time for daily removal of garbage at the building, and the garbage left for pick-up did not get into the stairwell at issue.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985];

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary

relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Notice: Actual and Constructive

Actual notice is not established and/or argued in this case.

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v. Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept. 2000]; *Guttierez v. Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept. 2004]; *Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept. 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept. 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is

legally insufficient to establish constructive notice (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

Garbage on Stairs

With respect to the garbage on the stairs, the record contains no evidence that anyone, including plaintiff, observed the garbage prior to the accident. Nor did she describe the garbage as being dirty or worn, which would have provided some indication that it had been present for some period of time*(cf. (Negri v Stop & Shop,*65 NY2d 625, 626; *Lewis v Metropolitan Transp. Auth.*, 64 NY2d 670,*affg on opn at* 99 AD2d 246, 249). [broken baby food jars were dirty]). Thus, on the evidence presented, the garbage on the stairway that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation. However, she did notice the debris that caused her to fall at the time of her fall. And, she did testify that on other occasions, she noticed garbage on the stairs.

Here, however, defendants are the movants, and defendants fail to submit sufficient evidentiary proof to satisfy their initial burden to make a *prima facie* showing affirmatively establishing the absence of notice as matter of law. While defendants assert that there were no prior complaints or similar incidents involving the subject stairway, the evidence they rely on, i.e. the deposition testimony of the building superintendent, is inconclusive at best. The superintendent did not testify as to what occurred on the date of plaintiff's accident, just his general routine.

And, according to the superintendent, the garbage was never taken down the stairs; however, there is no explanation as to what procedure was followed if/when the elevator was out

of service, as plaintiff contends was the condition at the time of her accident.

Although plaintiff cannot establish the length of time the condition existed, the movants have failed to establish what occurred with respect to the stairway cleaning on the date of plaintiff's accident. As such, summary judgment is denied as to this aspect of plaintiff's claim. And, the condition of the handrail likewise results in denial of summary judgment.

Defective Handrails

In this action involving a fall related to a defective handrail, the defendants have the burden of establishing their *prima facie* entitlement to judgment as a matter of law by demonstrating that they maintained their property in a reasonably safe condition (*see Andrini v Navarra,* 49 A.D.3d 575, 856 N.Y.S.2d 145; *Mokszki v Pratt,* 13 A.D.3d 709, 710, 786 N.Y.S.2d 222). The defendants failed to make a *prima facie* showing of their entitlement to summary judgment because they failed to demonstrate, as a matter of law, that the alleged defective handrail was not a proximate cause of the accident. Defendants do not counter plaintiff's expert affidavit as to the defective handrail.

Defendants' case law on this point is distinguishable. In *Jefferson v Temco Services Industries, Inc.,* 272 AD2d 196, 708 NYS2d 21 (1st Dep't 2000), plaintiff failed to raise a triable issue with respect to his claim premised on the purportedly defective design of the handrail, because he offered no non-speculative ground in support of his theory that he would have recovered his footing had the handrail projected an additional quarter-inch from the wall and so been free of the claimed defect (*see, Salzo v Bedding Showcase,* 238 AD2d 180, *lv denied* 90 NY2d 806). In the instant case, plaintiff testified that she reached for the handrail and it was "too low" (misaligned), and she, therefore, was unable to grasp it to break/stop her fall.

Likewise, *Kane, as Administratrix of the Estate of David Kane, Deceased v Estia Greek Restaurant, Inc.*, 4 AD3d 189, 772 NYS2d 59 (1st Dep't 2004), is distinguishable. In *Kane*, plaintiff's decedent did not remember or know why he fell, but only knew that he was found at the bottom of the staircase, and rank speculation is no substitute for evidentiary proof in admissible form-even though expert alluded to potential defects on the stairway. In the instant case, plaintiff has sufficiently established that her fall was connected to the alleged defect. It stands unrefuted that plaintiff tried to steady herself with the handrail but could not since it was not constructed in a contiguous manner and the rail at the point of the plaintiff's fall was lower than the handrail above it.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants 191st Street Associates, LLC and Intervest Development Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiff Nidia Gonzalez, **is denied**; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: February 18, 2009

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. CAROL EDMEAD

Carol Robinson Edmead, J.S.C.

INTERIM ORDER