Hepperman v MG Yorkville, LLC

2009 NY Slip Op 30557(U)

March 11, 2009

Supreme Court, New York County

Docket Number: 116216/06

Judge: Shirley Werner Kornreich

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SCANNED ON 3/16/2009

[* 1]

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 116216/2006
HEPPERMAN, JESSICA
vs.
MG YORKVILLE, LLC
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 116216/2006

MOTION DATE 12/11/08

MOTION SEQ. NO. 004

MOTION CAL. NO. ________

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3/11/09

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

JESSICA HEPPERMAN,

Index No.: 116216/06

Plaintiff,

-against-

DECISION AND ORDER

MG YORKVILLE, LLC and A & L REALTY CO.,

Defendants.
---X

KORNREICH, SHIRLEY WERNER, J.:

In this personal injury action, plaintiff Jessica Hepperman alleges she was injured on May 17, 2005, walking up the stairs to her apartment in a building located at 1427 Second Avenue, New York (the "building"). Defendant A & L Realty Co. (A & L), the prior building owner, moves for summary judgment and dismissal of the Complaint. Plaintiff opposes. The action was discontinued against MG Yorkville, LLC, the present building owner, pursuant to stipulation dated March 7, 2008.

I. Summary of Facts

A & L submits the pleadings and deposition transcripts in support of its Motion. Plaintiff was deposed and testified as follows. On May 17, 2005, plaintiff returned home from work at approximately 1:00 A.M. She was wearing flip flops and was walking up the inside steps when her foot got caught in a loop of the frayed carpet on one of the steps. She broke her jaw when she fell. There was a light out in the stairwell. At the time, plaintiff was subleasing an apartment in the building. If she had a problem in the apartment, she told her sublessor, who told someone named Sal. She never notified anyone or made any written complaints about the dim lighting or

the condition of the stairs, and she did not know of anyone else who had made written complaints. She did not see anyone on a regular basis as she went in and out of the apartment. She observed clutter and debris on the stairs and that the carpet was frayed. She did not observe that any steps were uneven or broken, or that the handrails were defective or broken.

Salvatore Gaudio (Sal) was deposed and testified as follows. On the date of the accident, A & L owned the building, which is a walk-up. They sold it to MG Yorkville on July 21, 2005. Sal and his parents were A & L's sole partners. They owned four buildings. Sal collected rent and took care of plumbing, electrical and other problems in the six apartments located in the building. He went to the building five or six times a year and walked up the inside steps. No superintendent lived in the building. There was a cleaning person who came in to take care of the common areas. A & L did not hire an outside managing agent for the building. It would have been Sal. There was a sign posted in the lobby identifying the managing agent as A & L. The inside staircase was carpeted, and the carpet had not been replaced since 1985, while A & L owned the building. Sal never saw any portion of the carpet frayed or ripped. He did not get any complaints about the carpet. He never noticed anything unsafe about the carpet. The cleaning person would change lightbulbs in the common areas if they required replacement. Sal could not recall any maintenance having been done to the staircase area of the building while he was with A & L.

Photographs were taken of the staircase in October 2005. The pictures showed lights out, a dirty staircase and a frayed rug with a loop hanging off. Plaintiff testified that they depicted the stairway's condition as it existed when she fell. Sal did not know whether the pictures accurately portrayed the condition of the stairs and stairwell.

Plaintiff, in her opposition, has attached an affidavit of the sublessor attesting that he had complained to Sal about the carpet and the burned out light in the stairwell at least three times between 2002 and 2005. Plaintiff also submitted an affidavit attesting that she had observed the loop in the stairway carpet and the general frayed condition of the carpet for over a year prior to her accident.

II. Discussion and Rulings

To obtain summary judgment, a movant 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); *Owusu v. Hearst Communications, Inc.*, 52 A.D.3d 285 (1st Dep't 2008). A movant must support its position with evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 560-563 (1980). Once a movant has met its initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, material issues of fact. *Id.* at 560; CPLR. 3212(b). *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 967-968 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case had no merit). 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). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v. Depew & Schetter Agency*, 154 A.D.2d 513, 515 (2d Dept. 1989).

To make out a prima facie case of negligence, plaintiff must demonstrate that defendant breached a duty of care owed to her and that defendant either created the dangerous or defective condition or had notice of the condition, actual or constructive, and failed to remedy it. *See*

Piaquadio v. Recine Realty Corp., 84 N.Y.2d 967 (1994); *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986); *Freeman v. Cobos*, 240 A.D.2d 698 (2d Dept. 1997); *Mercer v. City of New York*, 223 A.D.2d 688 (2d Dept. 1996); *Espinal v. New York City Hous. Auth.*, 215 A.D.2d 281, 282 (1st Dept. 1995); *Jackson v. Board of Ed. of the City of NY*, 30 A.D.3d 57 (1st Dept. 2006).

A & L has not met its burden as a matter of law. A & L does not dispute that it owed a duty of care to plaintiff. Nor has it refuted plaintiff's evidentiary showing that the stairway carpet was frayed and that a loop hanging off had caused plaintiff to trip. Moreover, Sal testified at his deposition, that he was not aware of the stairway carpet being repaired or replaced or of any maintenance ever being done to the stairway area from around 1990 through the day of the accident.

A & L owned the building from 1985 to 2005 and held itself out as the managing agent. NYC Administrative Code § 27-2005 (Duties of Owner) provides: "a. The owner of a multiple dwelling shall keep the premises in good repair." Violation of an Administrative Code section is some evidence of negligence. *Elliott v. City of New York*, 95 N.Y.2d 730, 735 (2001). Here, the evidence not only suggests negligence in the lack of maintenance and care of the stairway, but also that the negligence resulted in the frayed carpet, the dangerous condition that caused plaintiff's accident.

In addition, the frayed condition of the carpet, a condition that existed for more than a year, was sufficient to put A & L on notice of the dangerous and defective condition. "Liability based on constructive notice may only be imposed where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant's employees to

discover and remedy it." *Espinal, supra*, 215 A.D.2d at 282; *see Anderson v. Central Tractor Farm & Family Ctr.*, 250 A.D.2d 1023, 1024 (3d Dept. 1998) (constructive notice found where spill three feet long with twelve to fifteen sets of footprints tracking through).

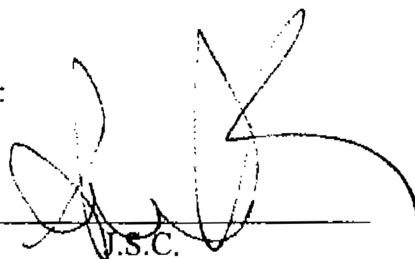
Consequently, although the court denies summary judgment to A & L (CPLR 3212(b)), the court upon searching the record grants summary judgment on liability to plaintiff. Accordingly, it is

ORDERED that the motion for summary judgment of defendant A & L Realty Co. is denied; and it is further

ORDERED that summary judgment on liability is granted to plaintiff; and it is further

ORDERED that the parties are to appear in Part 54 at 9:30 A.M. on April 2, 2009, for a pretrial conference.

ENTER:



J.S.C.

Date: March 11, 2009
New York, N. Y.

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