

Bleasdel v Broadway-Inwood Corp.

2009 NY Slip Op 32831(U)

November 27, 2009

Supreme Court, New York County

Docket Number: 100791/2007

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Ling-Cohan ^{DORIS LING-COHAN} _{J.S.C.}

PART 36

Index Number : 100791/2007

BLEASDELL, NOBLE

VS.

BROADWAY-INWOOD

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____

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 for summary judgment ~~is~~ by defendant is denied in accordance with the attached memorandum decision.

FILED

DEC 04 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/27/07

DORIS LING-COHAN
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----- X
NOBLE BLEASDELL and PAMELA BLEASDELL,

Index No. 100791/2007

Plaintiffs,

- against-

DECISION AND ORDER

BROADWAY-INWOOD CORP.,

Motion Seq. No.: 001

FILED
DEC. 04 2009
NEW YORK
COUNTY CLERK'S OFFICE

----- X
Defendant.

DORIS LING-COHAN, J.S.C.:

In this personal injury action, defendant Broadway-Inwood Corp. moves for summary judgment (CPLR 3212) dismissing the complaint on the ground that plaintiffs have failed to establish a prima facie case of negligence. The motion is denied.

Background

According to the verified complaint, on April 14, 2006, plaintiff Noble Bleasdell (Bleasdell), suffered personal injuries as a result of falling down the staircase between the fourth and fifth floors in premises owned by defendant, known as 4996 Broadway in Manhattan (the premises).

The verified bill of particulars (ex. C to mov. aff.) states that one of the dangerous conditions that caused and/or contributed to his fall was a missing handrail on the right wall along the stairs. The supplemental bill of particulars states that plaintiff will specifically rely upon section 27-375 (f) of the New York City Building Code and Residential Code of New York

State § R315.1, and § R314.1.

At his deposition, Bleasdell testified that he was responding to a complaint made by a tenant on the fifth floor of the premises on the day of the incident. While descending the west interior staircase in the building, he slipped and fell, as he started to leave the landing of the fifth floor. He was not holding the handrail on his left. There was no handrail on his right. The treads of the stairs are marble. Bleasdell did not testify at his deposition to any defective or dangerous condition of the tread.

Bleasdell fell to the intermediate landing between the fourth and fifth floors. He does not know what caused him to fall. He was looking down at the staircase when he fell. He was wearing work boots with rubber soles. He was carrying some brochures and some papers related to the tenant's complaint. In his testimony, he did not specify in which hand he was holding the brochures.

At his deposition, Bleasdell did not identify any cause for his fall. When asked what happened when he slipped, Bleasdell answered, "I tumbled and I fell" (ex. E to mov. aff., at 19). His right knee and hands came into contact with the steps. Bleasdell did not make any reference to the missing handrail as a cause for his fall in his deposition testimony.

The verified complaint contains two causes of action. The first cause of action, on behalf of Bleasdell, alleges that

Bleasdell was injured as a result of defendant's negligence in failing to maintain the stairwell between the fourth and fifth floors in accordance with applicable statutory and regulatory requirements. It does not specifically identify the absence of a handrail as a cause of the accident. Nor does the complaint describe how the accident occurred. The second cause of action is for loss of consortium by plaintiff Pamela Bleasdell.

In support of its motion for summary judgment, defendant argues that plaintiff has not submitted any evidence that code violations or the missing stair rail proximately caused his injuries, relying upon *McNally v Sabban* (32 AD3d 340 [1st Dept 2006]). *McNally* allowed summary judgment in favor of the owner where the intoxicated plaintiff fell down the stairs, and there was no evidence that would support a finding that code violations, including lack of a handrail, proximately caused plaintiff's injuries.

Defendant also argues that there is no evidence that Bleasdell reached out for the non-existent handrail, and therefore, because he was unable to identify the cause of his fall, any claim that defendant was negligent is entirely speculative, relying upon *Denicola v Costello* (44 AD3d 990 [2d Dept 2007]).

In *Denicola*, the Appellate Division, Second Department, affirmed an order granting summary judgment to a building owner

where the "injured plaintiff did not know what caused her to fall, and did not claim at her deposition that she would not have fallen if handrails had been in place" (*id.* at 991). The court held that it would be speculative to assume that the claimed violations, including absence of a railing on the stairs, proximately caused plaintiff's injuries. The court also stated that the "affidavit submitted by the injured plaintiff in opposition to the motion merely raised a feigned factual issue designed to avoid the consequences of her earlier deposition testimony" (*id.* at 990).

Defendant argues that, because plaintiff did not testify at his deposition that he would not have fallen if another handrail had been present, plaintiff has failed to establish a prima facie case of negligence, because there is no evidence that the absence of the handrail proximately caused plaintiff's injuries.

Bleasdell states in his affidavit, dated May 26, 2009, submitted in opposition to the motion, that he was descending the stairs at the time of the accident, as was his custom, by adhering to the right side of the steps so that others could pass to the left. Bleasdell states:

I slipped and began to lose my balance. In response to losing my balance, I reached out with my right, free hand toward the right wall in an attempt to sustain myself and regain my balance. However, there was no handrail on the right side of the stairway, and although, I was able to push my hand up against the wall, there was nothing available to hold onto and I was unable to sustain myself ... Due to the width of

the stairway, from where I was positioned, I would have been unable to reach the left side handrail.

Bleasdell challenges defendant's argument that he did not identify what caused him to fall, which defendant bases on Bleasdell's deposition testimony, on the ground that the examiner at the deposition focused only on the step itself, and never asked Bleasdell where he was positioned in the stairway, whether he did anything to try to regain his balance, or whether the lack of a railing played any role in his fall.

There is nothing in Bleasdell's affidavit in opposition that is inconsistent with his deposition testimony. Therefore, there is no basis to conclude that the affidavit in opposition is an attempt to create a feigned factual issue (see *Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311, 312 [1st Dept 2008]).

Defendant misplaces reliance upon *Telfeyan v City of New York* (40 AD3d 372 [1st Dept 2006]). In *Telfeyan*, the plaintiff testified at her deposition that she did not know what caused her to fall on the subway steps, and then later submitted an affidavit that her fall was caused by water on the steps. The later evidence was given no weight because it directly contradicted her prior deposition testimony that she did not know what caused her to fall.

The statement in Bleasdell's affidavit that he reached out for the missing hand rail does not contradict his deposition testimony that he did not know what caused him to fall.

Moreover, the fact that a plaintiff is unable to identify the precise cause of a fall down a stairway, does not preclude a finding that the absence of a handrail was the proximate cause of injury (see *Asaro v Montalvo*, 26 AD3d 306 [2d Dept 2006]).

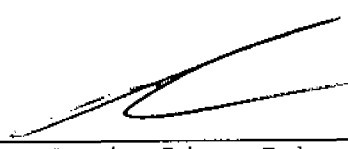
Bleasdell has met his burden of demonstrating the existence of a triable issue of fact as to whether the absence of a railing proximately caused his injuries.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the verified complaint is denied; and it is

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon defendant with notice of entry.

Dated: 11/27/09



Hon. Doris Ling-Cohan, J. S. C.

J:\Summary Judgment\bleasdell.broadway.wpd

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