Raghu v New York City Hous. Auth.
2009 NY Slip Op 33323(U)
August 19, 2009
Sup Ct, New York County
Docket Number: 115837/2007
Judge: Marilyn Shafer
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SCANNED ON 8/25/2009

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

PRESENT: Hon. Marilyn Shafer PART 8

Index Number : 115837/2007

RAGHU, SUMINTRA

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

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 is decided in accordance with the annexed memorandum.

FILED
AUG 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/19/09

MARILYN SHAFER J.S.C.

J.S.C.

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: IAS PART 8
---X
SUMINTRA RAGHU,

Plaintiff,

Index No.: 115837/07
DECISION/ORDER

-against-

THE NEW YORK CITY HOUSING AUTHORITY,
Defendant.
---X

FILED
AUG 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MARILYN SHAFER, J.S.C.:

In this personal injury action, defendant moves for summary judgment to dismiss the complaint (motion sequence number 002). For the following reasons, this motion is denied.

BACKGROUND

On July 10, 2007, plaintiff Sumintra Raghu (Raghu), a home health care worker and resident of Queens County, was injured on her way to care for a patient when she slipped and fell on a stairway in a building located at 173 West 151st St. (the building) in the County, City and State of New York. *See* Notice of Motion, De Lindsay Affirmation, Exhibit A (complaint), ¶¶ 1, 18-21. The building is owned, operated and managed by the defendant New York City Housing Authority (NYCHA). *Id.*, ¶¶ 4, 12-17.

At her depositions on October 23, 2007 and June 30, 2008, Raghu stated that her accident occurred at approximately 8:30 a.m. on the stairway between the building's second and third floors approximately two steps down from the third-floor landing. *Id.*; Exhibits G, at 9, 11-12; H, at 13, 16-17. Raghu also stated that the stairs that she stepped on were covered with a powdery white substance that contributed to her slip. *Id.*; Exhibits G, at 12-13; H, at 18-19. Raghu further stated that there was no bannister on the right side of the stairway to grab onto,

which made it difficult to break her fall. *Id.*; Exhibits G, at 15-16; H, at 21-22.

In addition to her deposition testimony, Raghu has submitted an affidavit from safety consultant Dr. William Marletta (Marletta), who examined the accident site and opines that the uneven level of the stairstep risers, the absence of the bannister and the failure to keep the stairs clean were all violations of various provisions of the Building Code. *Id.*; Exhibit E.

On October 24, 2008, NYCHA was deposed via one of its custodians, Loranzo Brown (Brown). *Id.*; Brown Affidavit, Exhibit 1. Brown initially testified that, on July 10, 2007, he had swept the stairs where Raghu was injured between 8 a.m. and 8:15 a.m., and did not see any white powder there. *Id.* at 15-17. In response to counsel's questioning, however, Brown stated that his "specific memory" of having swept that stairway on that date was based on the claim that "I do the same routine every day ... I don't change my routine." *Id.* at 20.

Raghu commenced this action on November 21, 2007 by serving a summons and complaint that sets forth one cause of action for negligence. *Id.*; De Lindsay Affirmation, Exhibit A. NYCHA filed an answer on December 17, 2007. *Id.*; Exhibit B. NYCHA now moves for summary judgment to dismiss the complaint (motion sequence number 002).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action.

See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Conclusory assertions which are unsupported by evidence are insufficient to sustain a motion for summary judgment. *See e.g. Mason v Dupont Direct Financial Holdings, Inc.*, 302 AD2d 260 (1st Dept 2003). Here, the court finds that defendant has failed to meet its burden.

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. *See e.g. Porco v Marshalls Dept. Stores*, 30 AD3d 284 (1st Dept 2006); *Britto v Great Atlantic & Pacific Tea Co., Inc.*, 21 AD3d 436 (2d Dept 2005). Here, NYCHA initially argues that there is no evidence that it had either caused or had actual notice of the condition that caused Raghu's injury - i.e., the white powder. *See* Memorandum of Law in Support of Motion, at 6-9. Plaintiff does not argue these points in its opposition papers. Therefore, the court deems them conceded and turns to the issue of constructive notice.

Here, NYCHA argues that plaintiff cannot establish constructive notice because "she does not know the length of time the white powder was present" on the steps where she fell. *See* Memorandum of Law in Support of Motion, at 10-12. However, the Appellate Division, First Department, has held that a plaintiff's failure to notice a hazardous condition prior to her fall, alone, does not conclusively establish the defendants' lack of notice thereof. *Porco v Marshalls Dept. Stores*, 30 AD3d at 284. Instead, defendants must also present evidence, usually from a knowledgeable employee, to establish when the area in question was last inspected or cleaned on the day of the plaintiff's accident. *Id.* Here, defendants have presented Brown's deposition

testimony. However, upon review, the court concludes that that testimony is equivocal, since Brown states both that he had a "specific memory" of having swept the stairway where Raghu was injured on July 10, 2007, and also that his memory is based on the fact that "I do the same routine every day." *See* Notice of Motion, Brown Affidavit, Exhibit 1, at 15-17, 20. Under these circumstances, the court is guided by the rule that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Service Industries, Inc.*, 295 AD2d 218 (1st Dept 2002). Therefore, the court finds that NYCHA has failed to establish lack of constructive notice at this juncture, but will permit it to renew its application for summary judgment to dismiss based on the lack of such notice after the presentation of evidence at trial.

NYCHA also argues that Raghu's presentation of Dr. Marletta's expert report is both unnecessary and that the report should be excluded. *See* Memorandum of Law in Support of Motion, at 14-19. NYCHA particularly objects to Dr. Marletta's opinion that its care and maintenance of the building departed from "good and safe practice," since that is one of the ultimate issues herein to be determined by the trier of fact. *Id.* Raghu responds that she submitted Dr. Marletta's report as evidence to both support her claim that NYCHA's negligence involved Building Code violations, and to counter NYCHA's argument that the issuance of a certificate of occupancy for the building constitutes proof of the absence of such violations. *See* Frowley Affirmation in Opposition, ¶¶ 5-6, 12-17. NYCHA replies that it is improper to use expert testimony to either prove or disprove such matter. *See* DeLindsay Reply Affirmation, ¶¶ 28-34. NYCHA is partially correct. "Although New York courts permit expert testimony on the question of whether a certain condition or omission was in violation of a statute or regulation,

[* 6]

this rule does not authorize expert testimony regarding the meaning and applicability of the law, which is the province of the court [internal citations omitted]." *Franco v Jay Cee of New York Corp.*, 36 AD3d 445, 448 (1st Dept 2007). Here, it remains to be seen how Raghu will attempt to use Dr. Marletta's expert testimony at trial. Therefore, the court rejects NYCHA's secondary arguments which, in any case, do not afford grounds for dismissal since they are not directed against any element of Raghu's prima facie case. Accordingly, the court finds that NYCHA's motion should be denied in full.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of the defendant New York City Housing Authority is denied.

Dated: New York, New York
August 19, 2009

ENTER:

MARILYN SHAFER
J.S.C.

Hon. Marilyn Shafer, J.S.C.

FILED
AUG 25 2009
COUNTY CLERK'S OFFICE
NEW YORK