

Slates v New York City Hous. Auth.

2010 NY Slip Op 30530(U)

March 11, 2010

Supreme Court, New York County

Docket Number: 118382/2006

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____ Justice

PART 3

Index Number : 118382/2006
FILED
 SLATES, JUNE
 vs.
 HOUSING AUTHORITY
 SEQUENCE NUMBER : 003
 SUMMARY JUDGMENT

MAR 15 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

INDEX NO. _____
 MOTION DATE 11/18/09
 MOTION SEQ. NO. 003
 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

Motion sequence 003 and 004 and plaintiff's cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of Stealth, in Motion Sequence No. 003, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against it is denied; and it is further

ORDERED that NYCHA's motion, in Motion Sequence No. 004, pursuant to CPLR 3212, for summary judgment (1) dismissing the complaint and all cross claims against it, and (2) on its cross claims against Stealth seeking Stealth's assumption of NYCHA's defense of the instant action, and contractual and common-law indemnification, is denied in its entirety; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment on the issue of liability is denied; and it is further

ORDERED that counsel for Stealth shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: 3/11/10


HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 35

-----X
JUNE SLATES,

Plaintiff,

-against-

Index No.
118382/2006

NEW YORK CITY HOUSING AUTHORITY, THE
CITY OF NEW YORK and STEALTH
CONTRACTING, INC.,

FILED

Defendants.

-----X
MAR 15 2010

CAROL EDMEAD, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequence Nos. 003 and 004 are ~~being~~ ^{being} considered for disposition. In Motion Sequence No. 003, defendant Stealth Contracting, Inc. (Stealth) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it. In Motion Sequence No. 004, New York City Housing Authority (NYCHA) moves, pursuant to CPLR 3212, for summary judgment: (1) dismissing the complaint and all cross claims asserted as against it; and (2) on its cross claims against Stealth seeking: (a) Stealth's assumption of NYCHA's defense of the instant action, and (b) contractual and common-law indemnification. Plaintiff June Slates cross-moves for partial summary judgment in her favor on the issue of liability against defendants NYCHA and Stealth.

Plaintiff commenced this action to recover for personal injuries she allegedly sustained on February 14, 2006, at approximately 8:00 a.m., when she slipped and fell on a patch of ice on the front entrance steps of the building where she resided,

located at 159-64 Harlem River Drive, New York, New York (the Subject Premises). Plaintiff claims that the patch of ice allegedly formed as the result of water dripping from scaffolding (the Sidewalk Shed) that, prior to, and on the date of the alleged incident, covered the exterior landing, stairs and ramp leading from the front entrance of the Subject Premises. This action was brought by plaintiff against NYCHA and the City of New York (the City), as owners of the Subject Premises, and Stealth, as the construction company which erected and maintained the Sidewalk Shed in connection with its contract with NYCHA to repair exterior brickwork thereat. The City is no longer a party to this action, pursuant to the parties' stipulation dated November 5, 2007, and the compliance conference order dated November 13, 2007.

Now the parties are seeking summary judgment in their respective favors, relying on, *inter alia*, the pleadings and the parties' depositions. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

In support of their respective applications for summary judgment, NYCHA and Stealth argue that they did not create or have any actual or constructive notice of the alleged icy condition. In support of their argument, they rely on, *inter alia*, excerpts from plaintiff's testimony, wherein she testified that she slipped on black ice that was on the step, which she had not noticed until after her fall (Stealth's Exhibit D, Plaintiff's deposition held on 11/2/07, at 68 & 70). Stealth further refers to excerpts from the depositions of: (1) Jean Claude Adrien, NYCHA's construction project manager, who testified, *inter alia*, that Stealth last worked at the Subject Premises on February 4, 2006, 10 days prior to plaintiff's accident (Stealth's Exhibit E, Jean Claude Adrien's deposition held on 12/3/08, at 54), and (2) Baber Choudhary, Stealth's president, who testified, *inter alia*, that no complaints had been received by Stealth, on or before February 14, 2006, with regard to snow and ice forming under the Sidewalk Shed, or to cleaning snow and ice off the Sidewalk Shed (Stealth's Exhibit G, Deposition of Baber Choudhary held on 12/4/08, at 77-78).

NYCHA also refers to those portions of the deposition of Manuel Montero, its janitorial caretaker assigned to the Subject Premises, who testified, *inter alia*: (1) that, after the plaintiff's accident, he observed a spot on the steps where water had been leaking from the ceiling of the Sidewalk Shed (NYCHA's Exhibit CC, Manuel Montero's deposition taken on 5/6/09, at 34), (2) that, in

the middle of the damp area, he saw a patch of ice that was barely visible (*id.* at 33, 51); (3) that the ice patch formed directly under the drip from the Sidewalk Shed (*id.* at 54); and (4) that the day before plaintiff's accident, there was not any ice on the stairs or landing of the Subject Premises (*id.* at 55).

In opposition to the motions of Stealth and NYCHA, and in support of her cross motion for partial summary judgment on the issue of liability, plaintiff argues that defendants are liable for her injuries, because Stealth created the defective condition that caused her fall, and that NYCHA had actual and constructive notice of the condition.

In support of her arguments, she relies on, *inter alia*, excerpts from: (1) the agreement between Stealth and NYCHA dated in 2002, wherein Stealth was required to "build and maintain sidewalk sheds," "maintain the sidewalk sheds ... from the beginning of the work until all work ... has been completed," and "provide corrugated sheets at ceilings of sidewalk sheds as water table" (Stealth's Exhibit L, Article V, item 12 [a], [e] & [f], respectively, at 161); (2) the deposition of Jean Claude Adrien, who testified that, pursuant to its contract with NYCHA, Stealth built the Sidewalk Shed covering the stairs and landing at the Subject Premises (Stealth's Exhibit E, Jean Claude Adrien's deposition held on 12/3/08, at 51, 69), and that when sidewalk sheds are created, they should drip off the sides, but not in the middle (*id.* at 60); and (3) the deposition

of Manuel Montero, who testified that he noticed that when it snowed, and the snow started to melt, water would drip down along the Sidewalk Shed onto the sidewalk (Stealth's Exhibit F, Manuel Montero's deposition held on 5/6/09, at 25), and that prior to February 14, 2006, he did not remember seeing water freeze after dripping from the Sidewalk Shed (*id.* at 25-26), but specifically remembers it happening that day because "it was super cold" (*id.* at 25). Plaintiff further refers to excerpts from her deposition wherein she testified that on February 14, 2006, on the date of her accident, another tenant of the Subject Premises slipped and fell on ice on the steps thereat (Stealth's Exhibit D, Plaintiff's deposition held on 11/2/07, at 80-84). She also submits affidavits from: (1) Dawnyell Manning, who alleges that she is a tenant and employee of NYCHA, and that, on February 14, 2006, at approximately 5:30 a.m., she "slipped and fell on ice that had accumulated in the entryway and on the steps underneath the sidewalk shed" at the Subject Premises (Plaintiff's Exhibit 2, Affidavit of Dawnyell Manning dated 11/3/09), and (2) Robert Slates, who alleges, *inter alia*, that, at approximately 6:30 a.m., on the morning of plaintiff's accident, he arrived at the Subject Premises, that he saw water running off the Sidewalk Shed, at the ends and in the middle of the shed, onto the steps and sidewalk of the Subject Premises; that visible patches of ice had already formed on those areas; and that, as he was going up the stairs to the entrance of

the Subject Premises, a woman came out of the building and slipped and fell on the steps (Plaintiff's Exhibit 1, Affidavit of Robert Slates dated 10/30/09).

In opposition to plaintiff's application, Stealth initially argues that plaintiff's cross motion is untimely, and accordingly, consideration of her papers should be limited only to plaintiff's opposition to defendants' motions, and no consideration should be given to any affirmative relief sought by her. Alternatively, it maintains that plaintiff fails to establish entitlement to summary judgment, and, at best, her papers raise a question of fact as to whether Stealth created the condition that caused plaintiff to fall.

Here, in order to demonstrate their entitlement to summary judgment, Stealth and NYCHA are required to demonstrate that they did not create the alleged dangerous condition or have actual or constructive notice of it (see *Maguire v Beyer*, 31 AD3d 621 [2d Dept 2006]). To establish constructive notice, a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

As conceded by plaintiff, Stealth demonstrates as a matter of law that it did not have actual or constructive notice of the alleged icy condition. However, the facts presented in this

record and assessed in the light most favorable to plaintiff (*Henderson v City of New York*, 178 AD2d 129 [1st Dept 1991]), sufficiently raise a triable issue of fact as to whether the alleged icy condition was caused as a result of the construction and/or maintenance of the Sidewalk Shed built by Stealth (see *Simon v Pabr Associates, LLC*, 61 AD3d 663 [2d Dept 2009]). Therefore, Stealth's application for summary judgment dismissing the complaint and all cross claims asserted as against it is denied.

With respect to NYCHA, it sufficiently establishes as a matter of law that it did not create the alleged icy condition. Further, generally, a plaintiff's deposition testimony that she slipped on black ice, which she did not see before her fall, is sufficient for a finding that a property owner did not have notice of the dangerous condition (see *Murphy v 136 Northern Blvd. Associates*, 304 AD2d 540 [2d Dept 2003]; see also *DeVivo v Sparago*, 287 AD2d 535 [2d Dept 2001]). However, here, plaintiff also testified as to the slip and fall of another tenant of the building at the same location, several hours before plaintiff's fall, who was also an NYCHA employee, and further, submitted an affidavit from that tenant confirming plaintiff's testimony. She also submitted an affidavit from her son, who alleged that he observed icy conditions at the subject location a few hours before plaintiff's accident. Thus, triable issues of fact exist, including the length of time the ice was on the ground before plaintiff's fall, and whether or not

NYCHA had actual and/or constructive notice of the icy condition (see *Maguire v Beyer*, 31 AD3d 621, *supra*; *Murphy v 136 Northern Blvd. Associates*, 304 AD2d 540, *supra*). Therefore, that branch of NYCHA's motion for summary judgment dismissing the complaint and cross claims asserted as against it is denied.

As argued by Stealth, plaintiff's cross motion for partial summary judgment on the issue of liability is untimely, in that it was filed on November 10, 2009, more than 123 days after the filing of the note of issue on July 9, 2009 (CPLR 3212 [a]). However, "a cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion" (*Filannino v Triborough Bridge and Tunnel Authority*, 34 AD3d 280, 281 [1st Dept 2006]), since the court "in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion" (*id.* at 281; CPLR 3212 [b]). Thus, although plaintiff's motion may be considered, there are issues of fact that would preclude the granting of summary judgment to plaintiff (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, *supra*). Therefore, plaintiff's cross motion for partial summary judgment on the issue of liability is denied.

That branch of NYCHA's motion for summary judgment on its cross claims against Stealth, seeking Stealth's assumption of

NYCHA's defense of the action, pursuant to their contract, and contractual and common-law indemnification is also denied, because the genuine issues of fact as to liability in the underlying personal injury action preclude summary judgment on NYCHA's cross claims (*Maldonado v South Bronx Development Corp.*, 66 AD3d 612 [1st Dept 2009]).

Accordingly, it is

ORDERED that the motion of Stealth, in Motion Sequence No. 003, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against it is denied; and it is further

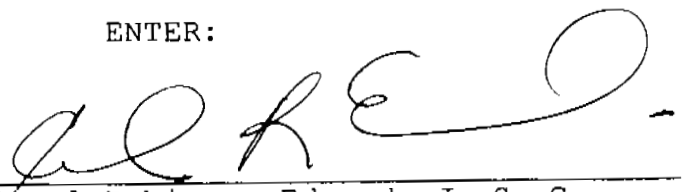
ORDERED that NYCHA's motion, in Motion Sequence No. 004, pursuant to CPLR 3212, for summary judgment (1) dismissing the complaint and all cross claims against it, and (2) on its cross claims against Stealth seeking Stealth's assumption of NYCHA's defense of the instant action, and contractual and common-law indemnification, is denied in its entirety; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment on the issue of liability is denied; and it is further

ORDERED that counsel for Stealth shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: March 11, 2010

ENTER:



Carol Robinson Edmead, J. S. C.

HON. CAROL EDMEAD

FILED
MAR 15 2010
NEW YORK
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