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

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 111938/2007
GRAY, KEVIN
VS.
550 REALTY HEIGHTS, LLC
SEQUENCE NUMBER : 003
PRECLUDE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for preclude

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by defendants to preclude is denied in accordance with the attached memorandum decision

(motion consolidated for disposition with motion seq. 002

FILED
JUL 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/21/10

JUDGE DORIS LING-COHAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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KEVIN GRAY,

Plaintiff,

-against-

550 REALTY HEIGHTS, LLC, J.C. REALTY MANAGEMENT CO. and SANDRA GREER REAL ESTATE INC.,

Defendants.

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Index No.

111938/07

Motion Seq. No.:
002 & 003

DORIS LING-COHAN, J. :

For convenience, Motion Sequence Numbers 002 and 003 shall be consolidated.

In Motion Sequence Number 002, defendants 550 Realty Heights, LLC (550 Realty) and J.C. Realty Management Co. (J.C. Realty) move for summary judgment dismissing the complaint. In Motion Sequence Number 003, such defendants move to preclude plaintiff from offering expert testimony and/or reports. Sandra Greer Real Estate Inc. was added as a defendant *via* amended complaint.

In this is a personal injury action, plaintiff alleges that on October 14, 2006, at about 9:00 p.m., he descended the staircase between the second and third floors of his apartment, located at 550 West 158th Street, New York, New York, when he slipped and fell, sustaining a broken ankle and other injuries. The complaint alleges that, due to defendants' negligence, careless and reckless conduct, plaintiff slipped, tripped and fell on the defective, broken, cracked, unsafe and uneven portions of the staircase.

550 Realty and J.C. Realty move for summary judgment, dismissing the complaint on the ground that plaintiff has not made out a case of liability against them. They contend that plaintiff has only offered speculation and self-serving testimony to prove that they were negligent in maintaining the staircase. Even if there was a defective condition in the staircase, 550 Realty and

J.C. Realty argue that plaintiff cannot demonstrate actual or constructive notice of the condition.

The moving defendants submit deposition testimony from plaintiff. Plaintiff testified that at the time of the accident, there was no light in the area and the seventh step from the top of the staircase, which he indicated was where he slipped, was worn in the middle. Plaintiff did not claim that there was obstructions on the step, like dirt or debris. He recalled that there was one handrail on the side of the staircase. Plaintiff provided photographs of the staircase. Plaintiff indicated that he had used the stairs once or twice per day prior to the accident, yet admitted that he had not complained to defendant about the lack of lighting or a worn condition of the staircase.

Also submitted is the deposition testimony of Sami Najjar, property manager for J.C. Realty, who stated that he was in charge of the day to day operations of the premises and that the staircase lighting was good. Najjar further testified that during his regular inspections of the premises, he never observed any defect to the staircase in general, and that if the marble had cracked or was worn, he would have it replaced. Najjar stated that no tenant, including plaintiff, had ever complained about the lighting in the staircase prior to the accident. Upon receiving notice of the lawsuit, Najjar testified that he inspected the staircase again and again observed no defects on the steps between the second and third floor landings.

On or about August 27, 2009, plaintiff filed a Note of Issue, asserting that discovery was complete and the case was ready for trial. The moving defendants argue that, with the completion of discovery, plaintiff cannot prove that there was a defective condition on the staircase, and that defendants had notice of any defects and failed to remedy the situation.

In opposition to the motion, plaintiff asserts that his testimony has provided an issue of fact as to whether the staircase was defective, with respect to the alleged lack of proper lighting

and the worn nature of the steps. Plaintiff also states that there was a failure to provide proper handrails at the staircase.

Plaintiff's counsel is also the attorney in a similar personal injury action, *Jones v 550 Realty Heights, LLC*, Index No. 102617/08 , commenced against the same defendants sued herein. The *Jones* case involves a claim that on May 16, 2006, an individual, Dale Jones, slipped and fell on the staircase, in the same building, between the first floor and the lobby, partly as a result of the allegedly worn condition of the nosing of the steps. Najjar was deposed in such case and testified that, at the time of the accident, he performed inspections of the premises at least once a week. In the event he found steps in need of repair, he would contact the general contractor of the premises, who was responsible for most of the maintenance or repair work there.

Plaintiff here claims that the moving defendants have failed to meet their burden of establishing there was no defective or hazardous condition to the staircase. Although they refer to Najjar's deposition testimony, there is no mention by Najjar as to what the condition of the stairs were on the date of the accident. Plaintiff asserts that Najjar's testimony confirms that there was a handrail on only one side of the stairs and no lighting directly above the stairs. Based on his own assertions, plaintiff claims to have established that the cause of the accident included the worn condition of the step at bar, the lack of a handrail to which one could have held, and inadequate lighting.

As to the issue of notice, plaintiff argues that defendants were advised of the defective condition of the stairs following the Jones accident, occurring on the same staircase five months prior to plaintiff's accident. Najjar testified that he was advised of Jones' accident the day after it occurred by the superintendent's wife who called to inform him about the accident.

Plaintiff further submits an affidavit from Scott Silberman, an engineer and the president of an engineering consulting firm. Silberman has conducted an investigation of the subject staircase and as a result, states that the area is in violation of various sections of the New York City Building Code and the New York State Multiple Dwelling Law.

As to the affidavit by Silberman, defendants have moved to preclude the testimony and other information from Silberman for failure to comply with the requirements of CPLR §3101(d). Plaintiff disclosed Silberman after filing the Note of Issue, and the disclosure allegedly refers to issues not previously discussed, namely violations of code requirements. Defendants claim prejudice if Silberman's report is allowed to be included in this case as they would have to retain their own expert testimony on short notice.

In opposition to the motion to preclude, plaintiff states that defendants, during the discovery period, delayed in providing plaintiff with work orders and invoices for work performed by the contractor for a two year period prior to and including the date of the accident. Plaintiff claims that he needed this information to assure what, if any, modifications had been made to the premises in order for Silberman to adequately provide his final opinion. Once the information was provided by defendants, plaintiff allegedly submitted the affidavit.

Plaintiff argues that he has maintained, from the beginning of this case, what the claims were with regard to the staircase, as well as any applicable violations. Plaintiff states that defendants had conducted an investigation early on in the case, relating to all of plaintiff's claims. Because no date has been set for trial at this time, plaintiff contends that defendants are not precluded from obtaining their own expert witness to rebut Silberman. Plaintiff maintains that the introduction of Silberman's affidavit is not willful or prejudicial in any way.

In a reply affirmation, defendants state that plaintiff's expert affidavit is not competent to

create a material issue of fact because plaintiff retained Silberman as an expert as early as 2006 without informing defendants at the time. They assert that plaintiff knowingly failed to disclose his existence until after the filing of the summary judgment motion. They aver that due to the allegedly prejudicial nature of the affidavit, such evidence should be precluded pursuant to CPLR 3101(d) (1).

Defendants claim to have met their initial burden demonstrating an absence of triable fact and, thus, are entitled to judgment as a matter of law. They argue that plaintiff has only offered conclusory evidence establishing a defective condition and has not rebutted their prima facie case demonstrating a lack of defects. Defendants contend that plaintiff has disclosed irrelevant deposition testimony from a different action, which involved a different part of the staircase, and such disclosure fails to raise a material issue of fact.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, " the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Gross v Amalgamated Housing Corporation*, 298 AD2d 224, 226 (1st Dept 2002).

Applying the above principles herein, the motion for summary judgment is denied, as there are factual issues, as detailed below, as to whether moving defendants were negligent, in

causing the subject accident. While, the introduction by plaintiff of testimony related to a separate lawsuit may not be sufficiently relevant to confirm notice of the allegedly defective condition which caused the subject accident, Najjar testified in this action that he was responsible for any code violations at the premises and during his inspections he would look to see if there were any violations. Evidence of a violation of the Administrative Code may be considered some evidence of negligence. *See Elliot v City of New York*, 95 NY2d 730, 734 (2001). The issue of whether moving defendants, in fact, violated said Code, precludes the granting of summary judgment of dismissal.

Moreover, to constitute constructive notice, a defect must be visible and apparent and to exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). According to Silberman's affidavit, the condition that existed on the staircase at the time of the accident would have occurred over a long period of time, through a period of wear and tear. Najjar, an agent of the defendants, testified as to his regular and routine inspections of the staircase. There is a further issue of fact as to whether such a condition, which allegedly occurred over a lengthy period of time, should have been observed by a representative of defendants who conducted routine inspections, provided defendants with constructive notice and also precludes the granting of summary judgment.

Defendants' motion to preclude plaintiff from offering untimely noticed expert testimony and/or reports is denied. "CPLR § 3101(d)(1) does not require a party to respond to a demand for expert witness information 'at any specific time, nor does it mandate that a party be precluded from proffering expert testimony merely because of non-compliance with the statute' unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the

opposing party". Aversa v Taubes, 194 AD2d 580, 598 (2d Dep't 1993), quoting *Lillis v D'Souza*, 174 AD2d 976 (4th Dep't 1991).

Here, defendants have failed to demonstrate any actual prejudice, by any allegedly late notice of plaintiff's expert information. In response to defendants' demand for a bill of particulars, early in the course of this suit, plaintiff provided many of the specific laws violated by defendants were sections 52 and 78 of the New York State Multiple Dwelling Law, section 205-e of the General Municipal Law, and sections 27-127, 27-128 and 27-375 of the New York City Administrative Law. Further, plaintiff indicated that he reserved the right to amend his response to include additional laws, up until the time of trial. Thus, the moving defendants were already on notice of the alleged violations of various state and city rules, prior to the receipt of plaintiff's expert disclosure. Moreover, since a trial date has yet to be scheduled, defendants are not prejudiced should they decide to obtain an expert to rebut plaintiff's expert's opinion.

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion to preclude plaintiff from offering expert testimony is denied; and it is further

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

DATED: June 21, 2010

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

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