

**Dannel v New York City Hous. Auth.**

2010 NY Slip Op 31984(U)

July 22, 2010

Supreme Court, New York County

Docket Number: 109331/07

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD  
*Justice*

PART 35

Index Number : 109331/2007  
**DANNEL, PHAIMA**  
vs.  
**N.Y.CITY HOUSING AUTHORITY**  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion is for \_\_\_\_\_

**FILED**  
PAGES NUMBERED \_\_\_\_\_  
JUL 27 2010

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendant New York City Housing Authority for an order granting summary judgment in favor of defendant, dismissing the complaint of plaintiff Phaima Dannel, is denied; and it is further

ORDERED that the Mediation scheduled in this matter for September 20, 2010 at 10:00 a.m. is cancelled; and it is further

ORDERED that counsel shall appear for jury selection and trial before J.H.O. Ira Gammerman, Supreme Court, Part 40, Room 242, 60 Centre Street, New York on Monday, September 27, 2010 at 10:00 a.m. And that this trial shall not be adjourned or removed from the trial calendar without written consent of this court. And it is further

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

Dated: 7/22/10

  
**HON. CAROL EDMEAD** J.S.C.

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: PART 35

\_\_\_\_\_  
PHAIMA DANDEL, X

Plaintiff

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

\_\_\_\_\_  
EDMEAD, J.S.C. X

Index No. 109331/07

DECISION/ORDER

**FILED**

JUL 27 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**MEMORANDUM DECISION**

This is a personal injury action in which plaintiff claims he sustained a fracture of his right frontal bone in a trip and fall accident in the kitchen of his apartment at a New York City Housing Authority (NYCHA) building located at 136 West 91<sup>st</sup> Street in New York County. Plaintiff's accident is alleged to have occurred on April 9, 2006 at approximately 1:00 a.m. Plaintiff claimed that the floor in his kitchen was defective and that NYCHA had negligently maintained the floor.

Defendant NYCHA moves for an order granting summary judgment in favor of defendant, dismissing the complaint of plaintiff Phaima Dannel.

*Defendant's Contentions*

In this personal injury action, plaintiff's claim is premised on the assertion that he stumbled in his apartment due to the allegedly hazardous condition of his kitchen floor. The evidence, however, overwhelmingly shows that the injuries allegedly sustained by plaintiff did not result from an accident in his kitchen. To the contrary, police records, deposition testimony from the investigating officers, plaintiff's ambulance report and plaintiff's hospital records all

conclusively show that plaintiff's injuries resulted from a physical altercation with his son. Neither the investigating officers nor the health care providers to whom plaintiff spoke on the night of his incident reported that plaintiff's injuries were caused by an accident involving his kitchen floor, as he now alleges.

In plaintiff's 50-H plaintiff claims there were "little holes" in the floor. He was talking with his son and walking toward his son when he fell forward. In his EBT, plaintiff recounted an entirely different story. Plaintiff stated that he fell twice (p. 38); these two falls occurred five seconds apart. (p. 39) He claimed that he was talking with his son about why his son didn't clean the kitchen and wash the dishes. (p. 36) Plaintiff testified that he tripped in the kitchen when he was walking toward his son during this conversation. (Id.) Plaintiff did not recall whether he came into contact with anything when he fell in the kitchen. (p. 51) He stated that he got up but then "tumbled" and bumped his head on a dresser in a small hallway near the kitchen. (pp. 39-41) Plaintiff testified that he fell the second time because his son was "holding" him. (p. 41) Plaintiff denied that he and his son had a fight, but plaintiff testified that his son said "stop, stop, calm down." (Id.)

Despite plaintiff's testimony, evidence produced on the night of plaintiff's purported "accident" shows that plaintiff did not trip and fall due to the condition of his kitchen floor, as he now contends in the lawsuit.

NYPD Officer Yevgeny Varshavsky, who responded to plaintiff's apartment on the night at issue, testified at an EBT through his reports prepared in connection with his investigation of this incident that plaintiff "was pushed into a dresser by perp [his son]" and that plaintiff "sustained two lacerations to forehead.." There is no mention in the complaint report that

plaintiff tripped due to the condition of the kitchen floor or that plaintiff fell twice, as he testified during his deposition.

NYPD Detective Eric Jackson also investigated this incident and he testified at an EBT that plaintiff did not advise the police that he tripped or slipped on the kitchen floor.

That plaintiff declined to press charges against his son for the assault perpetrated on April 9, 2006 does not at all undermine NYCHA's motion for summary judgment or raise any material issue of fact.

Plaintiff's certified records from St. Luke's Hospital likewise show that his claimed injuries resulted from a physical altercation with his son and not from a purported defect in his kitchen floor. The ambulance report states that plaintiff's "chief complaint" was "my son pushed me." The Emergency Department record further states: "Pt. States he was involved in an altercation with his son, during which he struck his head against a dresser. No LOC, lacs to forehead."

Police and medical evidence decisively demonstrate that plaintiff's claim that he tripped due to a defective kitchen floor is feigned.

#### *Plaintiff's Opposition*

The defendant recites conflicting version, between the plaintiff's sworn testimony on one side, and the hearsay testimony of a police officer, and police detective and portions of a hospital record on the other, concerning what occurred in the plaintiff's apartment on April 9, 2006. By definition, conflicting versions of an incident create questions of fact which can only be resolved by a jury, thus precluding an award of summary judgment.

In essence, the defendant's motion is predicated exclusively upon an attack of the

credibility of the plaintiff's sworn testimony. However, credibility of any witness is the exclusive province of the jury and a motion for summary judgment must be denied if there is a question of fact concerning any material issue.

Plaintiff's testimony in his 50-H and his EBT is not contradictory. There is no material discrepancy between plaintiff's testimony in these two instances.

Further, the defendant's motion is devoid of any evidence or testimony by anybody who has any personal knowledge of the facts. The defendant's entire motion is predicated exclusively upon hearsay.

#### *Defendant's Reply*

Contrary to plaintiff's counsel's portrayal, NYCHA does not seek summary judgment simply because plaintiff's sworn testimony was self-contradictory with respect to how many times he fell. More accurately, summary judgment is warranted because *everything* the plaintiff stated around the time of this incident establishes that his injuries had *nothing* to do with an alleged defect in his kitchen floor.

Notwithstanding plaintiff's counsel's attempt to cloud the issue with a hearsay argument, the evidence put before this court by NYCHA in support of summary judgment is proper.

#### Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New

York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1<sup>st</sup> Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist,” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman*, 278 A.D.2d 811 (4th Dept.2000): Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition

testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial. (Internal citations omitted). *See also*, *Yaziciyan v Blancato*, 267 A.D.2d 152 (1st Dept.1999); *Perez v Bronx Park Associates*, 285 A.D.2d 402 (1st Dept.2001); *Glick & Dullock v Tri-Pac Export Corp.*, 22 N.Y.2d 439 (1968); *Singh v. Kolcaj Realty Corp.*, 283 A.D.2d 350 (1st Dept.2001).

Accordingly, the Court's function when determining a motion for summary judgment is issue finding and not issue determination. *Sillman v Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v Ceppos*, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v Goodson*, 8 N.Y.2d 167 (1960).

While it is clear that self serving affidavits from plaintiff him/herself, contradicting prior testimony shall be summarily disregarded, *Kistoo v City of New York*, 195 A.D.2d 403 (1st Dept.1993), it is equally clear, that third-party affidavits, from witnesses, which contradict plaintiff's prior testimony shall be disregarded as well. *Branham v Loews Orpheum Cinemas*, 31 AD3d (1st Dept.2006) (Court discounted affidavit from an eyewitness when the same "was so completely at odds with plaintiff's deposition testimony."

In the instant case, the conflict between plaintiff's statements matched against the statement from the NYPD Officer, detective, EMT and hospital records, is for a jury to decide.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant New York City Housing Authority for an order granting summary judgment in favor of defendant, dismissing the complaint of plaintiff Phaima Dannel, is denied; and it is further

ORDERED that the Mediation scheduled in this matter for September 20, 2010 at 10:00 a.m. is cancelled; and it is further

ORDERED that counsel shall appear for jury selection and trial before J.H.O. Ira Gammerman, Supreme Court, Part 40, Room 242, 60 Centre Street, New York on Monday, September 27, 2010 at 10:00 a.m. **And that this trial shall not be adjourned or removed from the trial calendar without written consent of this court.** And it is further

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

Dated: July 22, 2010



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMOAD**

**FILED**

JUL 27 2010

NEW YORK  
COUNTY CLERK'S OFFICE