Dones v New York City Hous. Auth.
2010 NY Slip Op 33862(U)
March 23, 2010
Sup Ct, Bronx County
Docket Number: 300001/2008
Judge: Mary Ann Brigantti-Hughes
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[* 1]FILED Apr 06 2010 Bronx County Clerk

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
Present: Honorable Mary Ann Brigantti-Hughes

DONES, MARTA

Plaintiff,

DECISION/ORDER

-against-

Index 300001/2008

NEW YORK CITY HOUSING AUTHORITY,
Defendant.

The following papers numbered 1 to 8 read on this Motion noticed on October 13, 2009 and duly submitted on the Motion Calendar of January 14, 2010 of Part IA15.

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Papers submitted	Numbered
Motion, Affirmation, Exhibits & Memorandum	1,2,3,4
Answering Affidavit & Exhibits	5,6
Replying Affidavit & Exhibits	7,8

Defendant, NEW YORK CITY HOUSING AUTHORITY (NYCHA), moves for summary judgment, and to strike certain phrases in the Plaintiff's Bill of Particulars.

This is an action to recover damages for personal injuries sustained by the Plaintiff, Marta Dones, when she slipped and fell on water leaking from an exposed pipe in her bedroom, on September 7, 2007, at 7:00 P.M. Plaintiff was a tenant in an apartment located on the eighth floor of a twenty-one story building owned and operated by Defendant NYCHA.

The water would run down from the top of the pipe "almost every day", at "random" times, beginning from April 2007 and continuing until July 2008. The pipe is described as one that runs from the ceiling to the floor.

Plaintiff "had complained about the leak repeatedly to ... NYCHA's building assistant, Ms. Williams, at least 5 times prior to the accident." Plaintiff testified that she made these

complaints to Ms. Williams in-person in Williams' office, (which was located on the ground floor of her building), as well as by telephone. In response to the complaints, on about four or five occasions, NYCHA sent its employees to inspect her apartment. On each of those occasions, Plaintiff personally showed the leaking condition to the inspectors. The inspectors told Plaintiff that they would inspect the apartment above. The tenant in the apartment directly above, (apartment 9M), informed Plaintiff that she had similar leaks. However, Defendant's employees never explained the cause of the leaks.

In the area where the water puddled, the tile floor in the bedroom was damaged: "deteriorated" and "buckled". When water accumulated, Plaintiff would mop it up herself. The condition could not be ameliorated by using a bucket; Plaintiff DONES bluntly stated: "you can't put no bucket".

Legal Standards:

It is well-established that: "to establish entitlement to summary judgment, defendant [is] required to demonstrate as a matter of law that he maintained the subject property in a reasonably safe condition and "neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof"[citations omitted]." *Mazerbo v. Murphy*, 52 A.D.3d 1064 (3rd Dept. 2008).

A triable issue is raised as to whether a defendant has constructive notice of a dangerous condition where a defendant is aware that an ""ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord" [citations omitted]." *Talavera v. New York City Tr. Auth.*, 41 A.D.3d 135, 136 (1st Dept. 2007).

"In that regard, where "a property owner has 'actual knowledge of the tendency of a particular dangerous condition to reoccur, he [or she] is charged with constructive notice of each specific recurrence of that condition' " [citations omitted]." *Mazerbo v. Murphy*, 52 A.D.3d 1064 (3rd Dept. 2008). See *Bush v Mechanicville Warehouse Corp.*, 2010 NY Slip. Op. 446 (3rd Dept.

Jan. 21, 2010).

However, it is noted that "a general awareness that litter or some other dangerous condition may be present" is not sufficient to charge a defendant with "constructive notice of the particular condition that caused his [a plaintiff's] fall." *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 838 (1986).

In recent cases, defendants have been denied summary judgment where "the 'recurring' condition was the result of a defect on the premises capable of repair[1] as opposed to the habitual activities of those not under the premises owner's control.[2] " (The New York Tort Citator, by O'Sullivan, Chapter I, Negligence, "Recurring Condition", Ed.'s Note in 2007 Supp [7th Ed. pub. by ALM Prop.]. See also 1A NY PJI3d 2:91, at 601-04 [2010]).

Discussion:

If credited, Plaintiff Dones' proof, summarized above, establishes that Defendant had actual knowledge of the ongoing and recurring condition of the leaking pipe.

In support of its motion for summary judgment, Defendant NYCHA offers the deposition testimony of its employee, Mr. Edward Joshua, a heating plant technician. Joshua's duties include making repairs related to heat and hot water systems in the subject premises, (the "Butler Houses"), where Plaintiff resided.

In relevant part, Joshua testified that he did not know, or recall, if he ever made repairs related to Plaintiff's apartment. Although Defendant keeps records, including work tickets and log books, Joshua had not reviewed any records. Joshua did attest to the fact that pipes carry hot water to the individual apartments throughout the year.

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[1] See e.g., Talavera v. New York City Tr. Auth., 41 A.D.3d 135 (1st Dept. 2007).

[2] Cf. Rivera v. 2160 Realty Co., L.L.C., 4 N.Y.3d 837(2005), rev'g Rivera v. 2160 Realty Co., L.L.C., 10 A.D.3d 503 (1st Dept. 2004).

However, Joshua alleges that it is during the heating season– which is from October 1st, to May 31st of each year – that NYCHA customarily provides "water in the form of steam to the steam riser pipes". Joshua summarily concludes that it was because NYCHA would not normally have intentionally "introduce[d] any liquid or vapor to the steam riser pipe inside Plaintiff's apartment" in the month of September, that "NYCHA could not have been responsible for a leaking steam riser pipe in Plaintiff's apartment.

In support of his opinion, Joshua relies only upon the Heating Plant Technician Log for September 7, and 8, 2007.[3] However, the September 7th log contains a notation that the writer signed out at 4:15 P.M.– which was prior to the time of the incident. According to Plaintiff, at 5:00 P.M., there was no water on the floor of her bedroom. Also, Plaintiff did not report this situation to Ms. Williams until 3 days later, on Monday, September 10, 2007.

As far as the September 8th log, there is no notation there that the burners' zone valves were closed. In his Affidavit, Joshua claims that the entry of "ZV Closed" on September 7, 2007 meant that the zone valve controlling the flow of liquid through the steam riser pipes was closed. Based upon his own reasoning, since there was no such notation on September 8th, then the zone valves must have been open.

Joshua repeatedly acknowledges that he did not review any other records – including Defendant's work tickets and log books, for the relevant period between April 2007 and July 2008.[4] However, without having the benefit of the records to refresh his recollection, he would not know: whether they documented complaints regarding the leaks; the cause of the leaks; or whether repairs were made relative to, or affecting, the pipe leaking in Plaintiff's apartment. Joshua's conclusion is flawed since it is not based upon a review of Defendant's relevant records, but is grounded merely on Defendant's customary practice of not introducing water into the

[3] (Joshua's Affidavit, p. 2, ¶ 2).

[4] (See Joshua's EBT, p. 9-17. See Joshua's Affidavit, p. 2, ¶ 2).

steam riser pipe during a typical September month. Thus, Defendant has not properly addressed whether there had, actually, occurred a (repairable) malfunction that resulted in water flowing through the pipes.

Accordingly, Defendant's submissions are insufficient to meet its burden on summary judgment. Defendant does not submit proof in evidentiary form disputing Plaintiff's claims that it received multiple complaints regarding the pipe leaking in Plaintiff's bedroom, and that its employees inspected her apartment and the apartment above. Defendant fails to address whether, upon inspection, its employees determined the cause of the leaks. Defendant is not forthcoming on the issue of whether the recurring leaks resulted from a defect in the premises capable of repair.

A recent case, having similarities to the case at bar, also involved the allegation that a leaking pipe caused a recurring dangerous water condition. *Talavera v. New York City Tr. Auth.*, 41 A.D.3d 135 (1st Dept. 2007). In Talavera:

> "plaintiff slipped and fell while ascending a set of interior stairs ...
> plaintiff testified at his General Municipal Law § 50-h hearing and pretrial deposition that the watery condition on the stairs was caused by a leaking pipe located in the area where the right-hand wall and ceiling met. Plaintiff further testified that he used the stairs regularly and had seen water on the stairs on many occasions." [emphasis added]

Talavera, supra, 41 A.D.3d at 135. The Court held that: "In light of plaintiff's testimony that he slipped on the stairwell that had become wet due to a leaking pipe, and that he had observed the same dangerous condition at that location on many prior occasions, a triable issue is raised as to whether the Transit Authority had constructive notice of the alleged hazard." *Talavera, supra*, 41 A.D.3d at 136.

In *Talavera*, the First Department Court further explained that, since the "plaintiff in this case identified a specific dangerous condition, to wit, the leaking pipe" as the source of the recurring wet condition, the case was distinguishable from other cases which held that a "general awareness" that a dangerous condition may be present was insufficient to charge a defendant

with constructive notice. *Talavera, supra*, 41 A.D.3d at 136. (*See e.g., Solazzo v. N.Y. City Transit Auth.*, 6 N.Y.3d 734 [2005][5]; cf. *Rivera v. 2160 Realty Co., L.L.C.*, 4 N.Y.3d 837[2005], *rev'g Rivera v. 2160 Realty Co., L.L.C.*, 10 A.D.3d 503 [1st Dept. 2004][6]).

Along this same vein, another recent case involved a dangerous condition that was allegedly caused by leaks from a wall that created flooding, on an interior staircase, due to a defective drain. *Tucker v. New York City Tr. Auth.*, 42 A.D.3d 316 (1st Dept. 2007). In *Tucker*, "plaintiff testified at his General Municipal Law § 50-h hearing and alleged in his bill of particulars that the wet condition was caused by a "trough" of water running down the side of the steps that caused flooding due to an obstructed drain." [emphasis added] " *Tucker, supra*, 42 A.D.3d at 317.

As in *Talavera* and *Tucker*, the Plaintiff Dones in the case at bar, likewise, identified a specific defect in the premises, to wit, the leaking pipe, as the source of the recurring wet condition; and a triable issue is raised as to whether the Defendant NYCHA had constructive notice of the defect.

It is also noted that, in denying summary judgment, the Court in *Tucker* indicated that relevant to the inquiry would be evidence of: "prior complaints of the condition, accident reports concerning the same location, maintenance records showing attempts to remedy the condition or

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[5] In Solazzo v. N.Y. City Transit Auth., 6 N.Y.3d 734, 735 (2005), the Court held that: "A general awareness that the stairs and platforms become wet during inclement weather was insufficient to establish constructive notice of the specific condition causing plaintiff's injury."

[6] The Court, in Rivera v. 2160 Realty Co., L.L.C., 4 N.Y.3d 837(2005), found that a defendant was not liable for a tenant's slip and fall on a beer bottle, at 5:00A.M., upon a theory of a recurring condition, just because "defendant's superintendent admitted actual knowledge that particular tenants frequently left refuse and garbage on the stairs." Rivera v. 2160 Realty Co., L.L.C., 10 A.D.3d 503, 504 (1st Dept 2004) rev'd by Rivera v. 2160 Realty Co., L.L.C., 4 N.Y.3d 837(2005).

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deposition testimony by Transit Authority's employees indicating actual notice." *Tucker, supra*, 42 A.D.3d at 317.

As discussed above, in the case at bar, Defendant NYCHA does not meet its burden on summary judgment since it fails to support its motion with such pertinent sworn proof, and documentation, addressing the issues.

It is also noted that, in *Tucker*, plaintiff had alleged "that the stained wall and drain area indicated that the leaks were present for a substantial period." *Tucker, supra*, 42 A.D.3d at 317. Likewise, Plaintiff Dones herein alleges the tiles in her bedroom floor were deteriorated as a result of the chronic water damage.[7]

A defendant was also denied summary judgment in another similar case, where a plaintiff alleged that she had complained multiple times regarding a recurring tripping hazard: shifting concrete underneath a carpet. The Court held that:

> "if credited, this proof would establish that defendant had knowledge of a recurring tripping hazard in the same area, albeit not the precise place, where plaintiff later fell [citations omitted] ... Since this and other proof in the record raises an inference that there was a known recurring and pervasive problem with the concrete underneath the carpeting in the area where plaintiff was injured which was only superficially worked on, but never adequately addressed so as to repair the underlying problem, we conclude that a triable issue of fact exists as to constructive notice, precluding summary judgment in defendant's favor [citations omitted]." [emphasis added]

Mazerbo v. Murphy, 52 A.D.3d 1064 (3rd Dept. 2008).[8]

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[7] (Plaintiff's 50-h Hearing, p. 25-26).

[8] In a footnote, the Mazerbo Court made the following comment, which is applicable herein as well: "It must be reiterated that this case concerns the denial of a summary judgment motion and not an "imposition of liability." There can be no question that the subject record contains numerous discrepancies, ambiguities and sharp credibility disputes that we believe should more appropriately be resolved by a trier of fact. We note that the role of an appellate court on such a motion is "'[i]ssue-finding, rather than issue-determination'"[citations omitted]." Mazerbo v. Murphy, supra, 52 A.D.3d 1064 (3d Dept. 2008).

Another very recent analogous case involved a plaintiff who fell from a ladder while "he was attempting to free a box of merchandise that was stuck to the surface of a pallet as a result of water leakage from the warehouse's roof." [emphasis added] *Bush v Mechanicville Warehouse Corp.*, 2010 NY Slip. Op. 446, 1 (3d Dept. Jan. 21, 2010). In *Bush,* "the record demonstrate[d] that the roof of the warehouse had a chronic leakage problem and that defendant was fully aware of its defective condition and knew that the infiltrating water caused by the leaks could cause damage to the stored material." Plaintiff alleged "that defendant failed to maintain the roof in accordance with industry standards and to properly evaluate and address the condition of the roof despite notice of the ongoing chronic leaks ... [, and] that the infiltration of water into the warehouse, either directly or through the moisture from the chronic leak condition, resulted in the dampening of the pallets and inventory stored thereon and ... caused the box at issue to adhere to the pallet." *Bush, supra*, 2010 NY Slip. Op. 446, at 2-3.

Under the circumstances, the *Bush* Court held that:

> "If credited, plaintiff's proof would permit a jury to find that defendant had constructive notice of the dangerous condition where the accident occurred by virtue of its knowledge of the recurring problems with the roof leaks elsewhere in the warehouse [citations omitted]. Thus, we find that the evidence of a known recurring and chronic leakage problem with the roof of the warehouse which ... was never adequately addressed so as to remedy the underlying problem raises a triable issue of fact as to constructive notice [citations omitted] and "whether defendant[ ] should have corrected the condition in the exercise of reasonable care"[citation omitted]."

Bush, supra, 2010 NY Slip. Op. 446, at 2-3.

Likewise, in the case at bar, there are triable issues of fact regarding whether Defendant had constructive notice of the dangerous condition by virtue of its knowledge of the recurring and chronic leaks, and whether Defendant properly evaluated, identified, and addressed the alleged underlying defect in the premises.

Issue Regarding Plaintiff's Bill of Particulars:

Defendant seeks to strike the language in the Plaintiff's Bill of Particulars which provides

that Defendant was negligent in: "failing to place runners and/or mats to cover the water and/or absorb the wet; by failing to place mats, carpeting or other materials so as to cover, absorb or otherwise remove the water from the floor." [9] Defendant argues that these words should be struck since they assert a new theory of liability which was not included in the Notice of Claim.

As Plaintiff points out, these allegations merely amplify the Notice of Claim, which provides that Defendant was negligent in leaving the area "unguarded and unprotected" and in failing to "maintain" the area. (See "Notice of Claim").

However, this issue is largely academic, since Plaintiff's testimony was that the way to ameliorate the condition was to mop-up the water. In her testimony, Plaintiff dismissed the idea that a bucket could help catch the water.[10] Likewise, there is no evidence that this – residential– bedroom would be properly maintained by the use of a"carpet" to absorb the water, or a "mat" or "runner" to "cover" the water.[11]

In this regard, in a recent case where a plaintiff fell in the lobby of a building, "the principal theory of plaintiff's case [was] that defendants failed to place additional mats in the lobby, including a mat covering the spot where he fell.... [P]laintiff reason[ed] that if additional mats had been placed in the lobby, the moisture, whatever its source, would have been absorbed." *Pomahac v. TrizecHahn 1065 Ave. of the Ams..* LLC, 65 A.D.3d 462, 464 (1st Dept. 2009).

Notably, the *Pomahac* Court held that: "the reasonable care standard does not require a defendant to cover all of its floors with mats to prevent a person from falling on tracked-in

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[9] (See Plaintiff's Bill of Particulars).

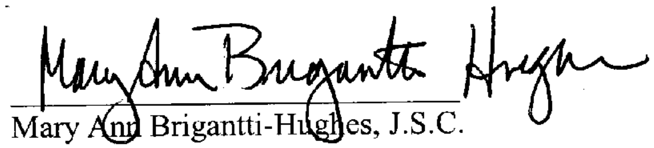
[10] (Plaintiff's 50-h Hearing, p. 24-25).

[11] (On the contrary, carpets and mats left in a bedroom may have impeded efforts to promptly mop-up water, or may have otherwise contributed to a hazard of tripping or mold).

moisture [citations omitted] ... Instead, all of the circumstances regarding a defendant's maintenance efforts must be scrutinized in ascertaining whether the defendant exercised reasonable care in remedying a dangerous condition." [emphasis added] *Pomahac, supra*, 65 A.D.3d at 466.

Accordingly, Defendant NYCHA's motion is **denied**. This constitutes the decision and order of this Court.

Dated: March 23, 2010



Mary Ann Brigantti-Hughes, J.S.C.