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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 113648/2008
WILLIAMS, ARLENE
VS.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion to/for _____

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

FILED

JUL 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: JUN 30 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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ARLENE WILLIAMS,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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Decision/Order

Index No. 113648/08
Motion Seq No. 002

Present:
Hon. Judith J. Gische, JSC

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
NYCHA n/m (3212) w/ JPT affirm, DK affid (sep back) exhs	1, 2
Pltf opp w/RF affirm, exhs	3
NYCHA reply w/JPT affirm, exhs	4
Order, Gische J., 5/5/ 11	5
Steno Record 3/31/11	6

Gische, J.

Defendant New York City Housing Authority (NYCHA) moves, pursuant to CPLR 3212, for an order dismissing the complaint on the grounds that: a) plaintiff Arlene Williams (Williams) has failed to establish that NYCHA either created or had actual or constructive notice of the alleged defective condition; b) Williams' recklessness was the sole cause of the alleged accident; and c) the doctrine of primary assumption of risk applies. If the court does not dismiss the complaint in its entirety, NYCHA seeks an order dismissing those claims alleged in Williams' bill of particulars that were not previously alleged in her notice of claim.

Williams, who lives in a NYCHA-owned apartment building located at 2370 2nd Avenue, New York, New York (the Building), alleges that she was injured on April 2, 2008, when she slipped and fell in a puddle of urine while descending stairwell A within the Building. The

Building, located in the NYCHA-owned Wagner housing development (Wagner Houses), contains an elevator and two stairwells, designated as stairwells A and B.

On the day of the incident, Williams had returned to her apartment, on the 8th floor of the Building, during a lunch break from her job at a nearby school. Williams states that when she left her apartment at approximately 12:30pm to return to work, she waited 10-15 minutes for an elevator. When it did not come, she decided to go down the stairs. While she was descending stairwell A between the 7th and 6th floors, Williams became aware of the presence of the urine, which covered the third and fourth steps up from the 6th floor landing. She decided to continue down the steps and attempt to avoid most of the urine. Williams states that she held onto the handrail and "stepped over the fourth step down to the third step, and that's when my foot slipped out." (Williams Deposition; Feb. 18, 2010, at p. 50). She fell forward onto the 6th floor landing, sustaining injuries as a result.

NYCHA argues that it is entitled to summary judgment because it did not have actual or constructive notice of the transient condition that allegedly caused Williams to slip and fall. NYCHA asserts that, absent such notice, it did not breach any duty that it had to Williams, and did not cause her alleged injuries. Instead, according to NYCHA, Williams' recklessness, in attempting to navigate stairwell A, instead of walking up a few steps to the next floor and then either waiting for the elevator or using stairwell B, was the sole proximate cause of her alleged injuries. NYCHA maintains that Williams assumed the risk that her actions may have led to her being injured.

NYCHA states that the record demonstrates that there were no complaints made on April 2, 2008 for the alleged condition on stairwell A, as well as no complaints concerning stairwell B. Dwayne Kirkland (Kirkland), a NYCHA employee who was the supervisor of caretakers

assigned to the Wagner Houses at the time of the alleged incident, explained that he would have been informed if tenants had made complaints to NYCHA of urine in the stairwells. Kirkland asserted that, on April 2, 2008, NYCHA did not receive any complaints, either formally or informally, of any urine on the steps in the A stairwell between the 7th and 6th floors of the Building. (Nov. 23, 2010 Kirkland Affidavit). NYCHA asserts that, if any complaints had been registered with NYCHA's janitorial department, or any cleaning in addition to the normal daily janitorial schedule had been necessary, Kirkland would have noted it in the Supervisor of Caretakers logbook. The logbook has no record of any additional work that had to be performed on April 2, 2008.

NYCHA notes that its janitorial schedule for the Building shows that stairwells A and B were patrolled each morning between 8 and 9:30 a.m. Any problems discovered would be eliminated right away. In Kirkland's affidavit he stated that it was his "recollection" that Felix Lopez, the Caretaker J on duty on April 2, 2008, walked through and cleaned the building between 8 and 9:30am, and that he did not report the presence of urine or any other liquid on the staircase between the 6th and 7th floors of stairway A or B.

NYCHA argues that its papers demonstrate, prima facie, that it is entitled to summary judgment, because it did not have actual or constructive notice of the alleged condition, such that the burden shifts to Williams to produce proof sufficient to establish the existence of material issues of fact.

NYCHA further maintains that the newly asserted claims in Williams' bill of particulars should be stricken, because she may not use a bill of particulars to amend the notice of claim by setting forth new theories of liability or new causes of action where the claims in the notice of claim do not fairly imply the statements contained in the bill of particulars. According to

NYCHA, Williams' bill of particulars asserts new causes of action, including allegations that NYCHA failed to have competent or sufficiently trained personnel and claims of unspecified violations of unspecified Multiple Dwellings Laws and the Administrative Code of the City of New York. Thus, according to NYCHA, if the court does not grant summary judgment dismissing the complaint in its entirety, it should grant that branch of its motion that seeks to strike the elements of the bill of particulars that contain new claims not found in Williams' notice of claim.

Williams contends that there was a consistent, ongoing problem with urine and debris existing on steps in the Building's stairwells. She asserts that NYCHA was aware of this ongoing and recurring dangerous condition of debris inside stairwells, such that it should be charged with constructive notice of each reoccurrence of that condition. Williams testified that, prior to her accident, she used the stairs within the Building approximately 3 or 4 times a week. Williams had last used stairway A two days before her accident. At that time, she observed urine in the stairwell, although not at the location where she slipped and fell on April 2, 2008, and called in a complaint to NYCHA about the condition. (Feb. 18, 2010 Williams Deposition, at 47-48) Williams testified that she had complained about urine in the stairs to NYCHA approximately 9 or 10 times during the years she had lived there, of which 5 or 6 of the complaints were over the telephone to the NYCHA office. (Id. at 48-49).

Williams notes that the testimony of Clarence Forbes (Forbes), the NYCHA employee who was assigned as the janitorial caretaker for the Building until five days before her accident, further establishes that NYCHA was aware of the regular presence of urine on the stairs. Williams states that Forbes testified that he started each day by making sure that both elevators within the Building were working, after which he went to the top floor and walked down the

staircases to check for any debris, urine, etc. Forbes stated that he generally found urine and feces within the Building's stairwells "a couple of times a week." (June 22, 2010 Forbes Deposition, at 19). Kirkland was also aware that the Building had problems with people loitering in the stairwells, and that debris, urine and/or feces were sometimes left on the stairwells. (March 3, 2010 Kirkland Deposition, at 58-62).

Thus, according to Williams, NYCHA had constructive notice of the urine upon which she slipped, by virtue of its knowledge of the ongoing and recurring condition of debris, urine, and/or feces on the stairs in the Building.

Williams also disputes NYCHA's assertion that her alleged recklessness was the sole cause of her accident and injuries. She argues that her injury was a natural and probable consequence of slipping and falling on urine within the staircase, which was present on a frequent basis. Williams further maintains that she does not introduce new claims in her bill of particulars, but rather that the claims therein simply amplify the claims in the notice of claim.

On a motion for summary judgment, the movant has the burden of making a prima facie showing of entitlement to judgment as a matter of law, providing 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 this prima facie showing has been made, in order to defeat a motion for summary judgment, the party opposing the motion must set forth the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

A real property owner "seeking 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." *Sabalza v Salgado*, __ AD3d __ , 2011 NY Slip

Op 04732 (1st Dept 2011). There is no allegation that NYCHA created the condition, nor that it had actual notice of the existence of the urine at that location at the time of Williams' fall. Thus, the question is whether NYCHA had constructive notice of the unsafe condition.

"To constitute 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). "The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law." *Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 (1st Dept 2010). There is no testimony or evidence as to how long the urine was on the steps. Therefore, constructive notice cannot be established in this way. Thus, NYCHA presented a prima facie case of its entitlement to summary judgment.

The burden therefore shifts to Williams. Another manner by which constructive notice of a hazardous condition can be established is by proving "an ongoing and recurring dangerous condition in the area of the slip and fall, which routinely was left unaddressed by the landlord." *Megally v 440 W. 34th St. Co.*, 246 AD2d 346, 347 (1st Dept 1998). Williams argues that the presence of urine and/or feces on the Building's stairwells occurred regularly enough that it constituted an ongoing and recurring dangerous condition. She contends, therefore, that summary judgment should not be granted, because she has created an issue of fact as to whether NYCHA had constructive notice of the presence of the urine on the day of her accident.

A "general awareness" that a dangerous condition may be present, however, is legally insufficient to create constructive or actual notice of a plaintiff's specific injury-causing condition. *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 (1994); *Gordon*, supra, at 838.

In applying the circumstances of the instant case to the case law in this area, the court finds that the situation is one of general awareness that a dangerous condition may be present, and not one in which there is a recurring dangerous condition that went unaddressed by NYCHA. NYCHA provided the schedule by which the janitor descended the stairwells each morning, sometime between 8 and 9:30, to check for debris, urine, etc. Testimony established that, if the janitor found any such matter on the stairs, he would clean it and remedy the condition immediately. Testimony and documentation further showed that there was no complaint on April 2, 2008 of urine in the Building's stairwells. Thus, NYCHA did not have actual notice of any such condition. Also, Williams did not submit evidence indicating that such problems went unaddressed or that NYCHA was unresponsive when she or other tenants made NYCHA aware of the presence of substances that had to be cleaned in the stairwell.

In *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 (2005), the Court of Appeals granted summary judgment to a defendant landlord in a case similar to the one at hand. The Court of Appeals reversed the decision of the First Department, 10 AD3d 503, 504 (1st Dept 2004), which had denied summary judgment because it found that the landlord might be liable on the basis of a recurring condition, given that the landlord knew that certain tenants of the building "frequently left refuse and garbage on the stairs" and that "tenants and their guests 'constantly' 'partied' in the stairway", spilling liquids and leaving bottles - the same condition that allegedly caused the plaintiff's fall and injury.

In reversing the Appellate Division, the Court of Appeals stated that the plaintiff did not raise a material issue of fact as to whether the landlord had constructive notice "on any theory" of the hazardous condition in the stairway. *Rivera*, 4 NY3d at 838. The Court of Appeals noted that there was no evidence that "the landlord was notified of the debris that night or that the

bottle was present for a sufficient period of time that defendant's employees had an opportunity to discover and remedy the problem." *Id.* The court held that, on the evidence submitted by the parties, the dangerous condition "that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation." *Rivera*, 4 NY3d at 838-39, quoting *Gordon*, 67 NY2d at 838.

In the instant case, similarly, no evidence has been submitted indicating that NYCHA was notified of the presence of the urine puddle upon which Williams allegedly slipped and injured herself, or that the urine was there for a sufficient period of time for NYCHA's employees to have an opportunity to discover and remedy the problem. Thus, NYCHA is entitled to summary judgment, as Williams has failed to raise a triable issue of fact as to NYCHA's liability for her injuries. Arguments raised by NYCHA that Williams was the sole proximate cause of her accident or whether she assumed the risk of navigating wet stairs present cumulative defenses. Having deciding that NYCHA proved its defense of lack of notice, there is no need to resolve these further defenses.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
June 30, 2011

So Ordered:

J.S.C.