SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10
Justice

Index Number : 105964/2010
COLLINS, CHARLENE
vs.
NYCHA
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 105964/10
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____
Answering Affidavits — Exhibits ____ | No(s). ____
Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

MAR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/21/12

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

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------X

CHARLENE COLLINS,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

----------X

DECISION/ORDER
Index No. 105964/2010
Seq #: 002

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

Papers	Numbered
Def's n/m (sep back) (3212) w/DB affirm, exhs	1,2
Pltf's opp w/ARZ affirm, CC affid	3
Def's reply w/DHB	4
Stip to adj	5

Hon. Gische J.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for personal injuries by plaintiff CHARLENE COLLINS ("Plaintiff") against defendant, the NEW YORK CITY HOUSING AUTHORITY ("NYCHA" or "Defendant"), owner and operator of 530 W. 55th Street, Apt. 3D, where a terrace door fell on Plaintiff, injuring her. Presently before this court is NYCHA's timely motion for summary judgment (CPLR § 3212; Brill v. City of New York, 2 N.Y.3d at 652 [2004]) dismissing the complaint. Plaintiff opposes in all respects.

Facts and Arguments Presented

Plaintiff claims to have suffered injuries on February 20, 2009, at approximately 2:00 a.m., when the sliding terrace door in her apartment fell off its track and landed on

top of Plaintiff, pinning her between the terrace door and a dog cage. Plaintiff contends that NYCHA is liable for her injuries because it carelessly and negligently maintained the premises. This contention is based on the assertion that NYCHA failed to properly maintain and repair the terrace door despite notice of its defective and hazardous condition. Plaintiff testified at a 50-H hearing, before she commenced this action and has been deposed by Defendant. Plaintiff testified to the following events:

Plaintiff has two dogs, called Winter and Blondie, that she lets out onto her terrace at least three times per day. The dogs either use the "doggy door" installed by Plaintiff to access the terrace or Plaintiff lets them out by opening the terrace door. The terrace door is made of glass and slides open behind another stationary glass panel.

According to Plaintiff, the terrace door was very difficult to slide open. Plaintiff stated that for "a couple of months" before the accident, there was no handle on the door and as of January 2009, the door would not open and close "without the use of a hammer almost." Plaintiff explained that she, in fact, used a hammer from a "little lady home kit" to "bang" the base of the door until it slid open or closed. Plaintiff also testified at her deposition that she used the hammer "for leverage" to pry open the door. Plaintiff stated that she telephoned NYCHA to complain about the broken handle on her terrace door, and NYCHA responded that they "don't have handles anymore." The number she called had been provided by NYCHA itself. Plaintiff testified she also made a complaint to NYCHA's management office in person about the defective terrace door, but NYCHA neither inspected the condition nor fixed the problem.

On February 20 2009, at approximately 2:00 a.m., Plaintiff testified that her dog, Winter, was barking near the terrace door so she manually let the dog onto the terrace

because "Winter won't go out the doggy-door." When the dog re-entered the apartment, Plaintiff had difficulty closing the door. Plaintiff was "so fed up with the situation" that she admittedly "gave [the door] a good yank," whereupon the door popped off the track and fell onto Plaintiff, trapping her between the door and a large dog cage.

While conceding that it received notice of the malfunctioning terrace door, NYCHA contends that its failure to maintain the terrace door was not the proximate cause of Plaintiff's injury. Rather, it claims Plaintiff's intervening action of "yanking" the door with such force was the sole proximate cause of the accident. NYCHA further argues that although Plaintiff was aware of the malfunctioning door, and the risk of injury, she assumed the risk of injury each time she used the defective door. NYCHA further argues that Plaintiff's conduct severed the causal connection between NYCHA's failure to maintain the terrace door and Plaintiff's injury, and therefore severs Defendant's liability to Plaintiff.

In opposition, Plaintiff first argues that NYCHA's motion for summary judgment should be denied as facially insufficient because it is not supported by an affidavit of a person with personal knowledge of the facts at issue, it is only supported by the affirmation of NYCHA's attorney.

Plaintiff denies that she was the sole proximate cause of her accident and alleges that if anything, it was foreseeable that Defendant's failure to properly maintain its premises could result in an injury. Plaintiff finally argues that NYCHA's failure to fix the terrace door violates RPL § 235(b), the warranty of habitability and that the lack of a functioning terrace door deprives Plaintiff of an essential service.

Discussion

Summary Judgment – Burden of Proof

To prevail on this motion for summary Judgment, NYCHA has to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Only if this burden is met does it then shift to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

Plaintiff's argument, that NYCHA's motion for summary judgment is facially insufficient because NYCHA did not submit an affidavit of a person with personal knowledge of the facts at issue, but only submitted an attorney affirmation is rejected. "The fact that Defendant[s'] supporting proof was placed before the court by way of an attorney's affidavit annexing . . . deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat Defendant[s'] right to summary judgment" (Olan v. Farrell Lines, 64 N.Y.2d 1092, 1093 [1985]; Hoeffner v. Orrick, Herrington & Sutcliffe, LLP, 61 A.D.3d 614, 616 [1st Dept. 2009]). Therefore, NYCHA's motion is facially sufficient and should not be denied for that reason.

Negligence

It is well established law that a landowner has a non-delegable duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party (Perez v. Bronx Park South, 285 A.D.2d 402 [1st

Dept. 2001]). This common law duty is, however, tempered by the requirement that a plaintiff seeking recovery must establish that the landlord had actual or constructive notice of the hazardous condition that precipitated the injury (Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 [1st Dept. 2000]).

As the owner of the subject premises, NYCHA has the burden of proving on this motion that it did not create the dangerous condition alleged, nor did it have a sufficient opportunity, within the exercise of reasonable care, to remedy the situation (see Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 [1986]; Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 [1st Dept. 1984] aff'd 64 N.Y.2d 670 [1984]; see, Mercer v. City of New York, 223 A.D.2d 688, 689 [2d Dept. 1996] aff'd 88 N.Y.2d 955 [1996]). Here, NYCHA concedes that it was aware of Plaintiff's malfunctioning terrace door but did not fix it, even after Plaintiff complained. However, NYCHA maintains that it is not liable to Plaintiff because Plaintiff's conduct was the superseding, sole proximate cause of her injuries. For the reasons articulated below, the court finds that NYCHA has failed to establish that, as a matter of law, Plaintiff was the sole proximate cause of her injuries.

To establish proximate cause, Defendant's negligent conduct must be a substantial factor in causing of Plaintiff's injury (Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 314 [1980]). It is well established law that "[s]everal acts may occur to produce a result; one or more being the proximate cause . . . " Foley v. State , 294 N.Y. 275 (1945). When Plaintiff's conduct contributes to her injuries, the fact finder must assess whether that conduct is a normal or foreseeable consequence of Defendant's

negligence (Boltax v. Joy Day Camp, 67 N.Y.2d 617 [1986]; Derdiarian, 51 N.Y.2d 308, 315 [1980]). "If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" (Derdiarian, 51 N.Y.2d at 316[1980]). The issues of proximate cause and foreseeability are generally for the fact finder to decide (Derdiarian, *supra*). Defendant is entitled to summary judgment based upon the absence of proximate causation only when Defendant proves either that the Plaintiff cannot establish the cause of her injuries, or when Defendant proves that its conduct, even if negligent, did not cause Plaintiff's accident (Rodriguez v. E&P Assoc., 20 Misc. 2d 1129(A), 872 N.Y.S.2d 693, *affm.* 71 A.D.3d 405 (2010); see also Cangro v. Noah Builders, Inc., 52 A.D.3d 758 [2d Dept. 2008]; Pluhar v. Town of Southhampton, 29 A.D.3d 975 [2d Dept. 2006]).

In support of its claim, that NYCHA is not the proximate cause of Plaintiff's injuries, NYCHA offers Plaintiff's testimony from her 50-h hearing and deposition. Plaintiff testified that she was aware that the terrace door was malfunctioning, because there was no handle on the door and it was extremely difficult to open and close. Plaintiff further testified that she "yanked" the door shut with some force because the door would not close and she was annoyed. Defendant argues that although it had notice of the malfunctioning terrace door and failed to repair the dangerous condition, Plaintiff was equally aware of the dangers of using the broken door and yanking it with force. Thus, NYCHA argues that Plaintiff's action of yanking the door closed on February 20, 2009 severed the chain of causation, rendering NYCHA not liable to Plaintiff for her injuries.

The evidence offered by NYCHA fails to establish entitlement to summary judgment on proximate causation grounds. NYCHA offers Plaintiff's testimony to establish that the absence of proximate cause is beyond factual dispute. Instead Plaintiff's testimony highlights the issue of fact as to proximate cause. There is evidence establishing that Plaintiff's injuries were proximately caused by NYCHA's failure to maintain Plaintiff's terrace door, in addition to other evidence establishing that Plaintiff's accident was due to her own actions, namely yanking the door and using a hammer as leverage on numerous occasions. A jury could conclude that once the door was malfunctioning, Plaintiff's yanking on the door or use of a took to close it was foreseeable. Thus, Plaintiff's actions were not necessarily so far removed from NYCHA's conduct as to break the causal nexus. Therefore, the evidence as to the cause of Plaintiff's accident is disputed and there exists a triable issue of fact as to the proximate cause of Plaintiff's injuries.

Primary Assumption of Risk

The doctrine of primary assumption of risk provides that a voluntary participant in a sporting event assumes the known risks normally associated with that sport (see Morgan v. State of New York, 90 N.Y.2d 471, 484 [1997]). The doctrine applies when injury stems from risks inherent in a sport activity in which a plaintiff voluntarily participates and plaintiff is aware of and appreciates the risks associated with the sport activity (Id.; Turcotte v. Fell, 68 N.Y.2d 432 [1986]). The primary assumption of risk doctrine does not absolve defendant from its negligent or reckless conduct if the injury suffered by plaintiff is not inherent in the sport or activity (Id.).

The doctrine has also been applied to cases not involving sports or recreational activities (Pelzer v. Transel Elevator & Electric Inc., 41 A.D.3d 379 [1st Dept. 2007] (court held that plaintiff assumed the risk of injury when climbing out of a stalled elevator); Roberts v. New York City Housing Authority, 257 A.D.2d 550 [1st Dept. 1999] (court found that plaintiff did not assume the risk of injury because he did not appreciate the risk)). This doctrine is a complete bar of recovery only when applied to a situation where there is an elevated risk of danger (Rodriguez v. New York City Housing Authority, 211 A.D.2d 328 (1st Dept. 1995), *rev'd on other grounds*, 87 N.Y.2d 887 [1995]). Here, Plaintiff's conduct did not rise to the level required for the doctrine of primary assumption of risk to be applied as there was no elevated risk of danger. Therefore, the primary assumption of risk defense is unavailable to NYCHA, and does entitle NYCHA to summary judgment in its favor.

Alternatively, non-primary assumption of risk does not bar complete recovery, but diminishes Plaintiff's recovery "in the proportion to which he contributed to his own injuries" (Id.; Turcotte v. Fell, 68 N.Y.2d 432, 438 [1986]). The determination whether Plaintiff had a non-primary assumption of risk and is thus comparatively negligent is for the trier of fact to decide.

Real Property Law § 235

Although claiming Defendant violated RPL § 235, Plaintiff's complaint set forth only one cause of action for negligence. No separate breach of contract claim under RPL § 235 is alleged. Therefore, Plaintiff's argument that NYCHA's conduct also violates RPL § 235 is not considered by this court in deciding Defendant's motion.

Conclusion

As the moving party, NYCHA has a greater burden to produce evidentiary facts than its adversary (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). By their very nature, negligence cases do not lend themselves to summary judgment because the issue of whether the defendant (or plaintiff) acted reasonably under the circumstances is rarely an issue that can be decided as a matter of law (Ugarriza v. Schmieder, 46 N.Y.2d 471 [1979]). Here, NYCHA failed to meet its burden of proof because there are triable issues of fact requiring the denial of NYCHA's motion (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Rotuba Extrudes v. Ceppos, 46 NY2d 223 [1978]). The determination whether NYCHA was negligent is for the trier of fact to decide (Ugarriza v. Schmieder, supra).

Order

In accordance with the foregoing, it is hereby:

ORDERED that NYCHA's motion for summary judgment is denied in its entirety as there are triable issues of fact; and it is further

ORDERED that this case is to proceed to mediation; Plaintiff shall serve a copy of this order on the office of trial support so mediation can be scheduled; and it is further

ORDERED that any relief requested that has not been expressly addressed in this decision, has been considered by the court and is hereby denied; and it is further

ORDERED that this constitutes the Decision and Order of the court.

Dated: New York, New York
March 21, 2012

So Ordered:

Hon. Judith J. Gische, JSC