

Wear v 515 W. 168th LLC

2012 NY Slip Op 31199(U)

May 1, 2012

Supreme Court, New York County

Docket Number: 104833/08

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 104833/2008
WEAR, KIM
vs.
515 WEST 168TH
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

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 determined in accordance with the accompanying decision/order.

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

FILED

MAY 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/1/12

Saliann Scarpulla
J.S.C.
SALIANN SCARPULLA

- 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: CIVIL TERM: PART 19

-----X

KIM WEAR,

Plaintiff,

- against-

515 WEST 168TH LLC,

Defendant.

-----X

For Plaintiff:
Russo, Darnell & Lodato, LLP
1975 Hempstead Tpke, Suite 401
East Meadow, NY 11554

For Defendant:
The Law Offices of Edward Garfinkel
12 Metrotech Center, 28th Floor
Brooklyn, NY 11201

Index No.: 104833/08
Submission Date: 2/1/2012

DECISION AND ORDER

FILED

MAY 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Aff in Support 2
- Reply Aff. 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant 515 West 168th LLC ("515 West") moves for summary judgment dismissing the complaint.

On February 22, 2008, plaintiff Kim Wear ("Wear") slipped and fell in a stairwell between the fifth and sixth floors of 515 West's premises located at 515 West 168th Street. Wear commenced this action seeking to recover damages for the injuries she sustained as a result of her fall. She alleged that 515 West was negligent in failing to have handrails on both sides of the stairwell, as required by New York City Building Code §27-375.

Wear testified at an examination before trial and provided an affidavit. She testified that she was staying with friends in apartment 5K in the subject building at the time of her fall.¹ At approximately 9:00 p.m., she carried a large black garbage bag with garbage inside of it out of the apartment to throw in the garbage chute. She walked up the stairwell from the fifth to sixth floor, threw out the garbage in a chute on the sixth floor, and then proceed to walk back down the stairwell to the fifth floor on the left side of the stairwell. There was a handrail to her right as she was walking down the stairs. As she was walking down the second or third stair, she started to feel herself slip. She tried to grab something to break her fall. She was too far to reach the right handrail, so she reached out to her left. Because there was no handrail for her to grab, she reached for the wall. She fell backwards and fractured her forearm.

515 West now moves for summary judgment dismissing the complaint. 515 West argues that there can be no basis for its liability because Wear did not identify any specific condition that caused her to fall and 515 West did not create or have notice of any condition that could have caused Wear's fall.

In opposition, Wear argues that 515 West's motion must be denied because issues of fact exist as to whether 515 West's negligence in failing to maintain its premises in a reasonably safe condition by not having a handrail on the left side of

¹ Wear explained that she was addicted to heroin at the time of her accident, but was not using heroin on the day of her accident.

the stairwell was a proximate cause of her accident. Wear submits a report from expert witness Anthony Mellusi (“Mellusi”), consulting engineer, dated March 30, 2011. Mellusi claimed that he reviewed two photographs depicting the subject stairwell. Mellusi explained that his inspection of the photographs “revealed the stairs to be of steel construction with marble treads with a single handrail on the open side of the staircase. It was also reported that the width of the stairs was measured at 54.” He opined that the absence of a second handrail in the stairwell was in violation of New York City Building Code 27-375, which required stairwells greater than 44" wide to have handrails on both sides.

In reply, 515 West argues that (1) Wear failed to disclose Mellusi during discovery, rather she disclosed him approximately a month after the note of issue, affirming that all discovery was complete, was filed; and (2) in any event, Mellusi did not inspect the stairs in question, did not include copies of the photographs he reviewed, did not identify the source of the photographs, and did not explain how he knew that the stairwell was 54" wide.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the

opposing party, who must then 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).

Here, 515 West fails to meet its burden of establishing entitlement to judgment as a matter of law. In support of its motion, 515 West argues that Wear did not identify any specific condition that caused her fall and it did not create or have notice of any condition that could have caused Wear's fall. However, 515 West fails to address the crux of Wear's claim, which is that she fell because 515 West was negligent in failing to maintain its premises in a reasonably safe condition by not having a second handrail in the subject stairwell, in violation of N.Y.C. Building Code §27-375. Wear clearly sets forth this basis for her claim in her bill of particulars and in her examination before trial testimony. 515 West does not address the issue of the handrail in its motion nor submit any evidence establishing that it was not negligent in failing to have a second handrail in the subject stairwell. Even in its reply papers, 515 West only criticizes the admission and probative value of Mellusi's report. It does not advance any arguments or submit any evidence to establish that it was not negligent in failing to have a second handrail in the subject stairwell.

Therefore, the court finds that regardless of the sufficiency of the opposition papers, 515 West has failed to meet its burden of establishing

entitlement to judgment as a matter of law and its motion is denied. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *O'Halloran v City of New York*, 78 A.D.3d 536 (1st Dept. 2010).

In accordance with the foregoing, it is hereby

ORDERED that defendant 515 West 168th LLC's motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

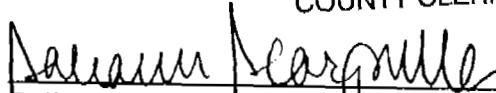
Dated: New York, New York
May 1, 2012

FILED

MAY 07 2012

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Saliann Scarpulla, J.S.C.