

Ortiz v City of New York
2013 NY Slip Op 32472(U)
October 8, 2013
Supreme Court, New York County
Docket Number: 110153/2004
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED

PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 110153/2004

ORTIZ, JOSE

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 003

DISMISS *CAL# 59*

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**


FILED

OCT 16 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10-8-13
OCT 08 2013


HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

- 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 5

-----X

JOSE ORTIZ,

Plaintiff,

-against-

DECISION/ORDER
Index No. 110153/2004
Seq. No. 003

THE CITY OF NEW YORK and THE NEW YORK
CITY HOUSING AUTHORITY,

Defendants.

FILED

-----X

KATHRYN E. FREED, JSC:

OCT 16 2013

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

**NEW YORK
COUNTY CLERK'S OFFICE**

PAPERS

NUMBERED

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2 (Exs. A-G)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3.(Exhs. 1-8)
REPLYING AFFIDAVITS.....4.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant the City of New York (“the City”), moves for an Order pursuant to CPLR§ 3212,
granting summary judgment. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court denies
the motion.

Factual and procedural background:

Plaintiff seeks the recovery of monetary damages for personal injuries he allegedly sustained
on May 11, 2003, when he tripped and fell on a step of the internal building stairwell of 523 West
134th Street in New York County. Plaintiff was returning to his apartment he shared with his

mother, after getting the mail. Upon falling on a defective step, his right arm went through a window on the landing, causing his injury. Said five floor building is owned by co-defendant Department of Housing Preservation and Development (“HPD”).

On July 28, 2003, plaintiff served a Notice of Claim on the City and a Summons and Complaint on or about July 6, 2004. Issue was joined via the City’s Answer on or about April 6, 2004. Plaintiff’s deposition was conducted on February 7, 2008. During his deposition, he testified that on May 11, 2003, he had checked the mail and was carrying three letters up to his apartment when he tripped and fell on a step between the second and third floor landings. He testified that he fell because the step was “slanted” downwards at its edge. (See Motion, dep. test, Exh. E, pp. 11-15, 20, lines 12-13). He also testified to a series of photographs taken by his mother subsequent to his alleged accident, annexed to the instant motion as Exh. F. While examining the photographs at the deposition, plaintiff marked the exact step that he claims to have tripped on.

On February 7, 2008, the City produced Afonso Polanco from HPD for a deposition. Mr. Polanco’s testimony is annexed as Exh. D. He testified that he is a building contractor with HPD, that his duties include working with tenant associations, and he currently manages about 20 buildings. He explained that if he receives a complaint in an HPD building, he calls the respective tenant association and informs them of the complaint. If the complained of problem is considered serious, he urges the association to remedy it immediately. Mr. Polanco also testified that the City will pay the cost of a “more costly item.” He also testified that “step sloping would be the responsibility of the tenant association” (*id.* at 16, lines 4-6. If all the steps were sloping, then HPD would send an inspector and repair them (*id.*, lines 7-16).

Mr. Polanco also testified that when HPD acquires a building, an inspection is conducted immediately, with later inspections occurring once every four years (*id.* p.18, lines 2-12). After being shown a photograph of the subject stair case, he testified that he could not recall whether there were any sloping steps when he walked up and down said stair case (*id.* p. 24, lines 8-11). Mr. Polanco also testified that a tenant association does not pay maintenance and wherein said association has made an application to HPD, and based upon the granting of that application, HPD then conducts the business of the management of the building in question (*id.* p. 9, lines 2-6). He further testified that he could not recall if there were other falls on the subject steps and would not have documentation referring to any falls in his possession (*id.* p.29, lines 23-25, p.30, lines 1-5).

The last compliance conference in this case was held on July 11, 2011. Discovery was deemed complete, and plaintiff was ordered to make a motion to compel for any disputed discovery. Plaintiff subsequently filed a Motion to Strike the City's Answer, which was deemed a motion to compel and was also denied via an Order rendered by Justice Barbara Jaffe. "On March 12, 2012, the City asserts that it served on plaintiff, the "cellar to roof inspection (Form 610), that was conducted at the time of [its] acquisition of the subject premises, on or about April 12, 1993" (*id.* p. 5, ¶ 9).

Positions of the parties:

The City argues that the complaint warrants dismissal because the City did not have notice of the alleged defective step. The City also argues that it did not have constructive notice of the defective step, in that to establish constructive notice, a defect must be visible, apparent and must exist for a sufficient length of time to permits its employees to discover and correct it. The City asserts that in response to Justice Jaffe's Order of May 24, 2012, the undersigned reviewed the entire

building file and produced any discovery concerning inspections that noted the condition of the interior stairwell. Based on that review, the most recent inspection prior to plaintiff's accident was a "follow up inspection form," that was completed on August 15, 2002 in response to an inspection of Apartment 22 in the subject building.

The City asserts that while the inspection was performed in Apartment 22, the conditions of the building itself were also noted on the inspection form. Said form indicates that there were no existing problems with the "public area," or "the structure" of the building itself (*id.* Exh. D). Moreover, prior to August the "general condition of the building" was "good." The City also asserts that another inspection was performed in Apartment 22 in 2000. However, the only noted structural problem with the building itself was that it required a new roof. In August of 2000, it was noted on the document entitled "DPM Building Management Plan," that the building "was getting a new roof." In 1998, an inspection document indicated that the building stairwells were all in "good condition."

Additionally, on April 3, 1998, an inspection of plaintiff's mother, Lucia Ortiz's apartment was conducted. Aside from conditions inside said apartment, the only complaint relevant to the building's structure that was noted, was that the intercom in the public area was not in working order. Notably, no other structural problems were indicated. The aforementioned Form 610 that was completed at the time of HPD's acquisition of the building in April 1992, noted that the stairwell was in "fair" condition. Thus, the City argues that the lack of any noted defective conditions with the subject stairwell precludes a finding of constructive notice.

The City also argues that it neither caused or created the subject defective condition and had no actual notice of its existence. The City argues plaintiff's testimony that the it had actual notice

is insufficient because in the complaint he alleges his mother made is “too broad in scope and attenuated in time, in that it was made more than a year prior to his alleged accident, and by his own admission, referred to the general condition of all the steps within the building (*id.* p. 8, ¶ 20). Lastly, the City argues that the photographs shown to plaintiff during his deposition fail to depict the presence of any notable defect. Therefore, since plaintiff’s allegation remains unsubstantiated and notice is lacking, the granting of summary judgment is necessary.

Plaintiff argues that defendant’s reliance on an inspection report created on April 21, 2003, about ten years prior to his accident, as support of its allegation of not having notice is insufficient. Plaintiff also emphasizes that despite the fact that the City claims that the alleged 1993 report described the subject staircase as “fair,” while the 1998 report describes it as being in good condition, it fails to provide any records of any repairs being made between 1993 and 1998.

Plaintiff also annexes the deposition testimony of Ms. Rosa Zorrilla, (Aff. in Opp., Exh. # 3). Ms. Zorrilla testified that she resides in the subject building and is the President of the Tenant’s Association (*id.* p. 7, lines 16-20). She testified that when the building was acquired by the City, the condition of the subject staircase was “bad,” and that the tenant’s association fixed it in 2002 (*id.* p. 9, lines 13-25). When shown the aforementioned photograph of the staircase that had been previously marked as Exh. G for identification, Ms. Zorrilla testified that the staircase originally looked worse and that the association had replaced the marble on the steps.

Ms. Zorrilla was shown the aforementioned photograph, and asked “on the third step of the landing, is the marble straight or is it not straight?” She responded “it is straight” (*id.* p. 17, 15-16). Upon reviewing another photograph previously marked for identification as Exh. 1, and being asked whether she could “see a chip or any irregularities on that stair,” she answered “a little bit here,”

pointing to the second step from the top, on the right (*id.* p.18, lines 7-15). Ms. Zorrilla also testified that the stairs were repaired prior to May 11, 2003.

Plaintiff also annexes an affidavit of Lucia Ortiz as an exhibit. In her affidavit, Ms. Ortiz states in pertinent part that the steps had become so worn, they significantly sloped downwards toward the lobby and were dangerous. She also states that in addition to the sloped step, the staircase was devoid of any light fixtures and only received indirect light which emanated from the lobby and second floor. Ms. Ortiz also states that two near falls prompted her to complain about the dangerous condition to Rosa Zorrilla. She further states that she also complained to Mr. Polanco on at least two occasions, prior to her son's fall.

Plaintiff argues that it is for a jury to infer from the appearance, irregularity and size of the defect, whether it existed for a sufficient length of time, wherein defendant, in the exercise of reasonable care, should have noticed it. Plaintiff also argues that even if constructive notice does not exist, actual notice does based on the complaints made by Lucia Ortiz to Ms. Zorrilla and Mr. Polanco. Lastly, plaintiff argues that "it was foreseeable that someone would be injured in a fall on a staircase and that the presence of a large glass window next to the stairs not containing safety glass would contribute to the injury; no notice would be required for such a created condition."

Conclusions of law:

"A defendant moving for 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 for a sufficient length of time to discover and remedy it"

(*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]; see *Petersel v. Good Samaritan Hosp. of Suffern, N.Y.*, 99 A.D.3d 880, 880 [2d Dept. 2012]; *Willis v. Galileo Cortlandt*

LLC, 106 A.D.3d 630 [2d Dept. 2013]; *Branham v. Lowes Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 320 [1st Dept. 2006], *affd* 8 N.Y.3d 931 [2007]). Only after the moving defendant has established this threshold, will the court consider the sufficiency of plaintiff's opposition (see *Perez v. Rodriquez*, 25 A.D.3d 506 [1st Dept. 2006]).

In order for the City to be held responsible for plaintiff's injury, plaintiff must establish that the City either created the dangerous condition or had actual or constructive notice of its existence, and failed to remedy it (see *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]). Constructive notice requires that "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 (*id.* at 837).

In the case at bar, the Court finds that defendant has failed to establish a prima facie case of lack of notice regarding the subject defect. Indeed, despite the fact that the City alleges that inspections of the staircase occurred, it fails to proffer any evidentiary proof of said inspections. The Court also finds the City's argument that the aforementioned photographs do not indicate any obvious defect to be unavailing, in that this argument is belied by the annexed deposition testimony, affidavits, and at least one photograph. Indeed, whether or not the chip appearing on a step in one of the photographs constitutes a defect and whether the City had notice of said defect are issues more appropriately reserved for a jury's determination.

In accordance with the foregoing, it is hereby

ORDERED that the City's motion for summary judgment is denied; and it is further

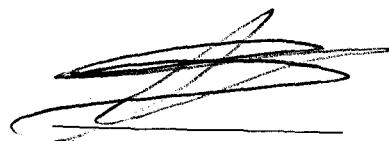
ORDERED that the parties are to attend a compliance conference on January 7, 2014 in 80 Centre Street, Room 103 at 2:00 p.m.; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 8, 2013

OCT 08 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

OCT 16 2013

NEW YORK
COUNTY CLERKS OFFICE