

Caraballo v New York City Hous. Auth.

2013 NY Slip Op 33495(U)

November 26, 2013

Supreme Court, New York County

Docket Number: 112853/2009

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING
J.S.C. Justice

PART 4B

Index Number : 112853/2009
CARABALLO, MARIA
VS.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 003
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 _____	<input type="checkbox"/> No(s). _____
Answering Affidavits — Exhibits _____	<input type="checkbox"/> No(s). _____
Replying Affidavits _____	<input type="checkbox"/> No(s). _____

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

"This motion is decided in accordance with the annexed decision and order of the Court."

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

FILED
DEC 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/28/13

JEFFREY K. OING, J.S.C.
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: IAS PART 48

-----x

MARIA CARABALLO,

Plaintiff,

Index No.: 112853/09

-against-

Mtn Seq. No. 003

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

FILED

-----x

JEFFREY K. OING, J.:

DEC 02 2013

Relief Sought
**NEW YORK
COUNTY CLERK'S OFFICE**

Defendant, New York City Housing Authority, moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint.

Factual Background

Plaintiff resides in apartment 8D in the Lincoln Houses located at 2101 Madison Avenue. On the morning of Saturday, September 6, 2008, plaintiff left her eighth floor apartment to go to work. After waiting from 7:25 a.m. to 7:50 a.m., plaintiff ultimately decided to take the stairs. She entered the "B" stairwell and proceeded to descend the staircase. She testified at her 50-h hearing that upon taking the first step down from the eighth floor landing she slipped and fell to the bottom of the landing.

Preliminary Issues

Defendant contends that plaintiff seeks to assert new claims in her bill of particulars that were not set forth in her notice of claim, and, as such, they should be barred. In that regard, defendant points to plaintiff's allegation in her bill of particulars that defendant "negligently painted, designed and/or made modifications to the aforesaid steps/stairway thereby eliminating the tread surface traction causing the steps/stairway to become and remain slippery" and failed to "apply a nonskid strip to the aforesaid steps/stairwell to avoid the slippery and unsafe condition" (Bill of Particulars, 2/22/10, Friedman Affirm., Ex. D, ¶ 5). The contention is unavailing.

Plaintiff's notice claim alleges the following:

The claimant, Maria Caraballo, was entering the eighth (8th) floor stairway at the aforesaid premises and as she took a step, she slipped on the step falling down the remaining steps to the landing below as a result of grease or some other foreign substance on the steps causing her to seek medical attention at North General Hospital and later at Bellevue Orthopedic Clinic.

* * *

The New York City Housing Authority, its agents, servants and/or employees were negligent in the ownership, operation, management, maintenance and control of the aforesaid premises, in that they allowed and permitted the aforesaid stairway to become and remain in a slippery and unsafe condition and to be so maintained as to prevent safe passage over and along the same; in that they failed to clean the area in question; in that they failed to warn the claimant of the slippery and unsafe condition of the said stairway

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and of the dangers inherent in traversing the same; in that they failed to provide adequate lighting in the said stairway; in that they failed to provide proper handrails on both sides of the said stairway; in that they failed to post signs or other warnings of the slippery and unsafe condition of the said stairway; in that they failed to make timely, adequate and proper inspections of the condition of the said stairway and to remedy the same; in that they failed to employ adequate and competent personnel to inspect, and/or maintain the said stairway; in that they failed to provide a safe means of ingress and egress at the said premises; in causing, allowing and permitting a trap to exist at said location; in failing to maintain the aforesaid stairway in a reasonably safe and proper condition; in causing, allowing and permitting an obstruction to claimant's safe passage at said location; in causing, allowing and permitting the existence of a condition which constituted a trap, nuisance, menace and danger to persons lawfully within the said premises; in failing to have taken necessary steps and measures to have prevented the above mentioned location from being used while in said dangerous condition; in negligently and carelessly causing and permitting the aforesaid stairway to be and remain in said condition for an unreasonable length of time, resulting in a hazard to the claimant and others; in failing to take suitable and proper precautions for the safety of persons using the said stairway; in that they failed to erect barriers, guards or other warnings at, about and around the dangerous, hazardous and unsafe conditions existing upon the said stairway; in that they allowed and permitted the claimant to be placed in a position of danger and peril to her life and limbs; in that they caused, allowed and permitted the said stairway to be so maintained as to constitute a danger, a hazard and a trap to persons lawfully traversing the same, including this claimant; and in otherwise being negligent.

(Friedman Affirm., Ex. F).

Given the extremely general and broad descriptions and allegations as to defendant's negligence, one would be hard pressed to conclude that the challenged allegations set forth in

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the bill of particulars are not embraced in the notice of claim. Indeed, plaintiff's allegations in the bill of particulars are not technically "new" claims, but are merely particularized iterations of the kind of general negligence charged in the notice of claim.

Next, defendant argues that plaintiff's 50-h hearing testimony is inconsistent and incredible. That argument is equally unavailing. Any inconsistency in plaintiff's testimony as to how the accident occurred is a credibility issue to be resolved by the trier of fact. In that regard, absent from the record is any accident report or other documentation evidentially sufficient to qualify as an admission on her part so as to permit the extreme finding on this motion that her testimony is incredible so as to warrant dismissal of this action.

Lastly, defendant's argument that this Court should not consider plaintiff's opposition because it is untimely is procedurally premature. On a motion for summary judgment, if the moving party has not met the initial burden of setting forth evidentiary facts sufficient to establish entitlement to judgment as a matter of law, the motion must be denied (Roman v Hudson Tel. Assoc., 15 AD3d 227, 228 [1st Dept 2005]). Indeed, in that situation, there is no necessity for the opposing party to respond with evidentiary proof (Id.). The threshold question

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that remains is whether defendant has satisfied its prima facie burden. If not, there is no need for this Court to consider plaintiff's opposition.

Discussion

As noted above, defendant has failed to demonstrate that there is no factual issue with respect to how plaintiff fell and the alleged dangerous condition so as to be entitled to summary judgment dismissing the complaint. The remaining issue is whether defendant had notice, either actual or constructive, of the alleged dangerous condition. In that regard, this action is factually indistinguishable from the facts in Gautier v. 941 Intervale Realty LLC, 108 AD3d 481 (1st Dept 2013).

There, the record demonstrated that the stairs were swept every morning and mopped three times a week at about 7:00 a.m. in accordance with a regular maintenance schedule, and that there were never any prior accidents on the steps caused by any foreign substance (Id. at 482). Further, the dissent observed that the "accident occurred at 3:00 a.m. and a landlord cannot be required to work around the clock on the chance that a dangerous condition might be created at any given moment" (Id. at 483). The dissent went on to further observe that the "two or three instances of a dog urinating on the stairs was insufficient evidence of a recurring condition" and that "even if it was, it was not routinely left unaddressed in light of undisputed evidence that

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the superintendent cleaned the stairs daily and confronted the subtenant who had the offending dog, which was later removed" (Id.). The majority affirmed Supreme Court's denial of defendant's summary judgment motion. Noting the dissent's observation, the majority found that the case relied on by the dissent to be distinguishable given that there was testimony that the caretaker followed the janitorial schedule. On the other hand, the majority found that the facts before them demonstrated that defendant offered no evidence that the schedule was followed the day before the accident, and that defendant made no showing as to when the stairway was last inspected before the plaintiff's accident (Id. at 481). As such, the First Department found that defendant's routine of cleaning the stairs on a daily basis was not germane to the dispositive issue of lack of notice of an alleged defective condition.

Here, in support of its summary judgment motion, defendant proffered the affidavit of Steven Lebowitz, defendant's manager at the Lincoln Houses during the relevant period. Lebowitz states that the janitorial schedule provides for sweeping and cleaning of the staircases daily and mopping of the staircases once a week, and that if there were a condition on the staircase that needed cleaning it would be rectified the day the condition was observed (Lebowitz Aff., Friedman Affirm., Ex. O, ¶ 4). He further states that during the relevant period the janitorial

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schedule provided for cleaning Monday to Friday from 8 a.m. to 4 p.m. and Saturday and Sunday 8 a.m. to 1 p.m. (Id. at ¶ 5). Lebowitz states that no one is assigned to clean the staircases after hours, and that the earliest cleaning time would be 8 a.m. the following day (Id.).

To begin, as in Gautier, supra, the fact that the accident occurred before the scheduled cleaning is not dispositive of the notice issue. More importantly, the existence of a janitorial schedule is not conclusive. Lebowitz's affidavit is evidentiarily insufficient because he does not have personal knowledge as to whether the janitorial schedule was followed the day before the accident.

Defendant also relies on the EBT testimony of Frank Saltares, defendant's supervisor/caretaker, whose responsibility is to inspect the caretaker's work. Here, Saltares did not inspect the stairwell the day before the accident. Indeed, the seven inspection reports which Saltares completed indicate inspection dates prior to the September 6, 2008 accident, with the latest inspection on August 20, 2008 that indicated the "Steps and Treads" needed "scrubbing" (McMahon Affirm., Ex. D). He also testified that he did not remember the last time he conducted an inspection prior to the September 6, 2008 accident (Saltares 4/4/12 EBT, Friedman Affirm., Ex. N, at p. 77). Given that Saltares does not have personal knowledge of the accident

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location, the condition of the stairwell prior to the accident, the procedure for reporting complaints, and whether there were reported complaints for the stairwell at issue in this action, his testimony is equally evidentiarily insufficient. Further undermining defendant's argument that it is entitled to summary judgment is the absence of an affidavit or EBT testimony from the two caretakers for the stairwell in question -- David Monroe and Marissa Martinez. Under these circumstances, defendant has failed to demonstrate prima facie that it lacked notice, actual or constructive, of the alleged dangerous condition.

Accordingly, it is

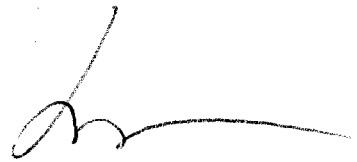
ORDERED that defendant's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that counsel shall call the Clerk of Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/26/13

FILED
DEC 02 2013
NEW YORK
COUNTY CLERK'S OFFICE



HON. JEFFREY K. OING, J.S.C.