

Betances v 470 Audubon Ave. Corp.

2014 NY Slip Op 30108(U)

January 13, 2014

Sup Ct, New York County

Docket Number: 116797/10

Judge: Doris Ling-Cohan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

JUAN MANUEL BETANCES,

Plaintiff,

INDEX NO. 116797/10

-against-

MOTION SEQ. NO. 002

470 AUDUBON AVE. CORP.,

Defendant.

The following papers, numbered 1-10 were considered on this motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	1, 2
Answering Affidavits — Exhibits _____	3, 4, 5, 6
Replying Affidavits _____	7, 8
Supplemental Submissions _____ (memos of law)	9, 10
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	_____

FILED

JAN 15 2014

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is decided as set forth below.

Plaintiff Juan Manuel Betances commenced this action to recover damages for personal injuries allegedly sustained as a result of a slip and fall on an interior staircase of 562 West 175th Street, New York, New York (Building), owned by defendant 470 Audubon Ave. Corp. Plaintiff resides in the Building, in an apartment on the fifth floor. Mario Tavares is the tenant of record of such apartment, and plaintiff has been renting a room from Mr. Tavares for over five (5) years.

BACKGROUND

On April 3, 2010, around 10:00pm, plaintiff slipped and fell on a banana or plantain peel, on the first step of the interior staircase, in the Building, going from the fourth floor to the fifth floor. Thereafter, plaintiff commenced this action against defendant alleging that defendant was negligent in maintaining the staircase, and permitting the staircase to exist in an unsafe and dangerous condition.

Defendant now moves for summary judgment.

DISCUSSION

In order to establish negligence, a plaintiff is required to prove “the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury”. *Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 (1st Dep’t. 2006), citing *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 (1928). Additionally, the standards of summary judgment are well settled. Summary judgment should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). “The proponent of a summary judgment motion must 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 University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]”. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Defendant argues that it is entitled to summary judgment, as it did not have notice, constructive or otherwise, of the alleged dangerous condition which caused plaintiff to slip and fall, and that such condition was open and obvious. Specifically, defendant contends that the superintendent of the

Building, Miguel Mendez (Superintendent Mendez), inspects and cleans the stairs of the Building every day beginning at 6:00am. Superintendent Mendez has been the superintendent of the Building for 16 years, and he is unaware of any complaints about garbage or dirt on the steps prior to plaintiff's accident on April 3, 2010. Defendant further contends that plaintiff clearly saw the banana peel prior to stepping on it, then intentionally stepped on it, and slipped and fell. In support of its motion, defendant proffers, *inter alia*, plaintiff's deposition transcript and Superintendent Mendez's deposition transcript.

In opposition, plaintiff argues that defendant has failed to make a *prima facie* entitlement to judgment as a matter of law. In support of its opposition, plaintiff proffers, *inter alia*, his own affidavit, the affidavit of Mr. Taveras, and the affidavit of a professional licensed engineer, Robert L. Schwartzberg (Engineer Schwartzberg). Plaintiff further argues that issues of fact exist, thus precluding summary judgment. Specifically, plaintiff argues that there is always garbage on the steps where he fell, and, thus, is a recurring unsafe condition left unaddressed by defendant sufficient to provide notice. Plaintiff also argues that the failure to clean the stairs, the failure to affix lights over the stairs, and the conditions of the risers and treads, along with the failure to install anti-slip protection on the stairs where plaintiff's accident occurred violate the New York State Building Code, The Administrative/Building Code of the City of New York and the Property Maintenance Code of New York State, thus creating an issue of fact.

Notice

Here, no evidence has been presented to demonstrate that defendant had either actual or constructive notice of any alleged dangerous condition. The notice required must be more than general notice of any defective condition. *See Gordon v Am. Museum of Natural History*, 67 NY2d 836, 838 (1986). Plaintiff testified that there was garbage on the first step on the stairs leading from the fourth

floor to the fifth floor of the Building, consisting of rice, beans, paper, and banana or plantain peels. *See* Polacco Affirmation, Exh. E, Plaintiff's Dep. at 42:14-43:9. Plaintiff clearly testified that the alleged dangerous condition, on which he slipped and fell, was the peel. *See id.* at 44:14-17. As to actual notice, at his deposition, Superintendent Mendez testified that, in his 16 years of employment as the superintendent of the Building, he never received any complaints about garbage or dirt on the stairs. *See id.*, Exh. J, Mendez's Dep. at 23:16-22. Moreover, while plaintiff testified that, about a year before his accident, he complained to Mr. Tavares about garbage on the stairs attracting mice, plaintiff concedes that he never complained to defendant about any garbage condition. *See id.*, Exh. E, Plaintiff's Dep. at 50:22-52:14. Thus, it is clear that defendant did not have actual notice of the alleged dangerous condition.

To demonstrate that defendant had constructive notice of the dangerous condition, "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." *See Gordon*, 67 NY2d at 837. At his deposition, plaintiff further testified that, on the day of his accident, as he was leaving for work in the morning, he did not see any food on the steps where his accident occurred. Plaintiff testified that the first time he saw food on the steps was when he was going home on the night of his accident. *See* Polacco Aff., Exh. E, Plaintiff's Dep. at 56:15-57:5. Superintendent Mendez testified in his deposition that he starts work at 6:00am every day, and he checks the front of the building, the lobbies, and the stairs for abnormalities. If abnormalities, such as cigarette butts or tissues are found, he corrects it by picking them up. Superintendent Mendez's last check each day is at 8:00pm. *See id.*, Exh. J, Mendez's Dep. at 15:4-16. Superintendent Mendez further testified that, on an average day, he checks the stairs five times. *Id.* at 15:24-16:2. Thus, defendant has established that it did not have either actual or constructive notice of the alleged dangerous condition.

As defendant has met its burden, the burden shifts to plaintiff to demonstrate by admissible evidence, that there are material issues of fact precluding the granting of summary judgment. However, despite plaintiff's numerous arguments in opposition, plaintiff has failed to meet his burden, and this case must be dismissed.

Recurring Garbage

Plaintiff argues, in opposition, that defendant failed to clean the stairs, and allowed the recurring accumulation of garbage on the stairs where plaintiff slipped and fell, in violation of the State of New York Official Compilation of Codes, Rules and Regulations, the Administrative/Building Code of the City of New York, and the Property Maintenance Code of New York State. In support of its opposition, plaintiff proffers his own affidavit, and that of Mr. Tavares, both of whom allege that there is always garbage on the stairs. Presumably, such statements from plaintiff and Mr. Tavares are provided to raise an issue of fact as to notice. However, as discussed above, Superintendent Mendez testified that he checks the stairs five times a day, the last time being at 8:00pm, only 2 hours before plaintiff's accident occurred. Furthermore, plaintiff specifically testified that he did not see any food on the steps where his accident occurred when he left for work the morning of his accident. The Appellate Division, First Department has held that an affidavit, such as that of Mr. Tavares, is "properly rejected... as feigned evidence tailored to avoid the consequences of plaintiff's deposition testimony that he did not observe any banana peels on the stairs... before the accident and never made any complaints to defendants specifically about garbage on the stairs." *Vilomar v 490 East 181st Street Housing Development Fund Corp.*, 50 AD3d 469, 470 (1st Dep't 2008). Thus, no issue of fact is raised by plaintiff and Mr. Tavares's affidavits as to garbage on the stairs. Further, even if there was an issue of "recurring garbage", and notice was given as to such, the Court of Appeals has held that notice must be specific rather than general. *See Gordon v Am. Museum of Natural History*, 67 NY2d 836, 838 (1986).

Lighting

In its opposition, plaintiff also proffers the affidavit of Engineer Schwartzberg, who opines that defendant's failure to affix light fixtures above the stairway proper violates the New York City Administrative Code (Administrative Code) § 27-381. Plaintiff's affidavit in support of his opposition also states that "there was no light fixture above the stairway between the fourth and fifth floors...[which] contributed to [his] accident because it was hard for [him] to see where all of the garbage was." Goldblum Affirmation in Opposition, Exh. A, Plaintiff's Affidavit, ¶ 5. In essence, plaintiff now, in opposition to defendant's motion for summary judgment, "attempts to attribute the accident in part to inadequate lighting, [however,] such assertions contradict his deposition testimony ... and therefore are to be disregarded as merely feigning an issue of fact." *Weiss v Gerard Owners Corp.*, 22 AD3d 406, 407 (1st Dep't 2005). Here, plaintiff indisputably testified that prior to his accident, he *saw* the peel, and then *intentionally stepped on it*. See Polacco Affirmation, Exh. E, Plaintiff's Dep. at 44:18-21. Thus, even if there was inadequate lighting, such was not the cause of plaintiff's accident, and no issue of fact exists as to lighting.

Risers and Treads and Anti-Slip Protection

Plaintiff's opposition, supported by Engineer Schwartzberg's affidavit, also argues that defendant failed to install anti-slip protection on the stairs in the Building, and that the condition of the risers and treads are in violation of the Administrative Code, the New York State Building Code, and the Property Maintenance Code of New York State. In its reply, defendant argues that such codes are inapplicable, as the codes were enacted after the construction of the Building. In support, defendant proffers, *inter alia*, the affidavit of Steven Pietropaolo, a licensed professional engineer, who opines that the stairs in the Building, constructed in 1924, complied with the City of New York Building Code published in 1926

and the City of New York Property Maintenance Code. *See* Polacco Reply Affirmation, Exh. A, Pietropaolo Affidavit. By interim order, dated July 15, 2013, this court ordered supplemental papers to provide both parties an opportunity to properly brief such issue.

Citing *Town of Conklin v Ritter*¹, Supreme Court, Broome County, Index No. 98-2690, November 5, 1999 Motion Term, Decision and Order dated November 12, 1999, plaintiff argues that such codes are applicable, as the *Town of Conklin* court held that “[a] property owner must be deemed to have purchased a building with a consciousness of the possibility that new technological developments may require installation of newly perfected means of protecting life and limb”. Plaintiff further argues that the Appellate Division, Third Department upheld such decision “for all of the reasons detailed by Supreme Court in its decision and order dated November 5, 1999.” *Town of Conklin v Ritter*, 285 AD2d 855, 856 (3d Dep’t 2001). In a three sentence decision, the Court of Appeals affirmed. *Town of Conklin v Ritter*, 97 NY2d 712 (2002). While the *Town of Conklin* courts found that the applicable codes governed the building, even though such building was constructed prior to the enactment of the codes, the Supreme Court of Broome County specifically emphasized that it “recognized a distinction between those aspects of the code regulating building construction and those designed as safety measures aimed at the premises in general and the persons thereon. ... The nature of the violations asserted...are covered by and in violation of ... ‘Housing Maintenance.’ They do not relate to the construction of the building; they are incident to the maintenance of the premises.” *Town of Conklin*, Supreme Court, Broome County, Index No. 98-2690, November 5, 1999 Motion Term, Decision and Order dated November 12, 1999. In *Town of Conklin*, the code was applied to the building only in relation to maintenance of such

¹ The court notes that plaintiff cited this unreported decision, without providing a copy to the court. Thus, aside from the portion of the decision quoted by plaintiff, the court was unable to review such decision in detail.

building. Thus, the only case relied upon by plaintiff, in support of its argument that the subject codes apply to the Building, is applicable to subsequently enacted codes only in relation to the maintenance of a building. Here, plaintiff does not contend that defendant violated such codes by failing to maintain the stairs. Rather, plaintiff argues that the risers and treads on the stairs in the Building are in violation of particular codes which were enacted after the Building was constructed. Defendant contends that when the Building was constructed in 1924, it complied with the City of New York's Building Code established in 1916. This is not refuted by plaintiff. Moreover, plaintiff has failed to raise an issue of fact as to defendant's maintenance of the stairs, which were constructed in compliance with the applicable code in 1924. Thus, plaintiff has failed to sustain its burden to raise a genuine issue of fact sufficient to preclude summary judgment.

Here, it is undisputed that plaintiff saw the alleged dangerous condition, a banana or plantain peel, prior to his accident, and *intentionally stepped on* such dangerous condition. Moreover, plaintiff clearly testified that the dangerous condition was the banana or plantain peel on which he stepped, and not on the lack of anti-slip protection on the stairs or the condition of the risers and treads. It is noted that in opposition, plaintiff failed to supply an affidavit by an expert which indicated that plaintiff's fall was due to the lack of anti-slip protection on the stairs or the condition of the risers and treads, or that such contributed to plaintiff's fall. Rather, Engineer Schwartzberg merely opines that the lack of anti-slip protection, and the condition of the risers and treads, violate certain code provisions. As defendant has established that it had no notice of such peel which caused plaintiff to slip and fall, and plaintiff has failed to raise a material issue of fact, defendant's motion for summary judgment of dismissal is granted.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of defendant; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the decision/order of the Court.

Dated: 1/13/14


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if Appropriate: DO NOT POST

J:\Summary Judgment\Betances v 470 Audubon Ave. Corp. - sj, banana peel, notice.wpd

FILED
JAN 15 2014
NEW YORK
COUNTY CLERKS OFFICE