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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

ANNETTE ROBINSON,

Plaintiff,

- against -

JAVIND 95TH STREET APARTMENT, LLC,

Defendant.

INDEX NO. 115390/10

MOTION SEQ. NO. 001

The following papers were read on this motion by plaintiff for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Annette Robinson (plaintiff), the tenant of apartment 5C located at 305 East 95th Street, New York, New York, 10128 brings this personal injury action against the owner of the apartment Javind 95th Street Apartments LLC (defendant) to recover damages for injuries allegedly sustained on October 14, 2009 when plaintiff slipped and fell on an accumulation of water on the floor of her apartment due to a leaking radiator and pipes.

Before the Court is a motion by the plaintiff for summary judgment on liability, pursuant to CPLR 3212, on the grounds that there are no material issues of fact regarding the defendant's negligence as plaintiff continuously reported water leaks to the defendant which were never addressed, and the issue of notice has been litigated and decided previously, thus it cannot be litigated again under the doctrine of collateral estoppel. Defendant opposes plaintiff's motion on the grounds that plaintiff's failure to attach a copy of the pleadings to her motion is fatally defective, and on the basis that collateral estoppel is inapplicable here as there is no evidence showing defendant had notice of leaking sink basin and pipe below sink, whereas only

the issue regarding a leaking radiator had been previously decided. Discovery in this matter is complete and the Note of Issue has been filed.

STANDARD OF LAW

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all

reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Sermos v Gruppuso*, 95 AD3d 985, 986 [2d Dept 2012], quoting *Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629 [2d Dept 2009]; *Larsen v Congregation B'Nai Jeshurun of Staten Is.*, 29 AD3d 643 [2d Dept 2006]). A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]; *Larsen*, 29 AD3d at 643).

DISCUSSION

As a threshold matter the Court will not dismiss plaintiff's motion for failure to attach the pleadings. "Although CPLR 3212 (b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete'" (*Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d 675, 675 [1st Dept 2013], quoting *Welch v Hauck*, 18 AD3d 1096, 1098 [3d Dept 2005] *lv denied* 5 NY3d 708 [2005]). "The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted" (*Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d at 675). Here, while the plaintiff failed to annex the pleadings to her initial moving papers, she attached them to her reply, and as such this Court has a complete set of papers upon which to decide the motion (*see Pandian v New York*

Health & Hosps. Corp., 54 AD3d 590, 591 [1st Dept 2008] ["we reject the contention that the court should have dismissed defendants' motion for failure to annex their answer to the initial moving papers, inasmuch as the responsive pleading was attached to the reply papers"]).

Now in turning to the merits, the Court finds that plaintiff has met her prima facie burden to establish entitlement to summary judgment on the issue of liability, as there is no triable issue of fact regarding whether defendant had notice of and allowed the defective and dangerous condition to exist in plaintiff's apartment. Specifically, it was found that defendant was on notice about leaking conditions in plaintiff's apartment during litigation that commenced by defendant against plaintiff in Landlord/Tenant Court for failure to pay rent. Notably, after a hearing held at the New York Housing Court on May 15, 2009, Judge Sabrina Kraus found that for the period of October 2008 through May 2009 "there was a lack of heat and leaking radiators existing in the subject premises...the Court finds that Petitioner was on notice of all of these conditions at all times" (Affirmation in Support, exhibit E pg. 13). Judge Kraus also found that defendant was intentionally avoiding plaintiff's attempts to communicate with defendant regarding the conditions in her apartment and their repair. As a result thereof, the Court granted plaintiff an abatement in her rent. Moreover, plaintiff had logged numerous complaints with the City of New York about leaks as well as other conditions in her apartment, and on one occasion, the Fire Department shut down the water system at the building to investigate the "water or stream leak" in plaintiff's apartment (*id.*, exhibit D), about which defendant was certainly aware. Moreover, contrary to defendant's contention, plaintiff testified that on the date of the accident the water on the floor was coming from both "in the radiators and the kitchen sink" (Affirmation in Support, exhibit A pg. 53 ¶¶ 23-25).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment on liability is granted; and it is further,

ORDERED that the amount of damages to which plaintiff is entitled shall be determined at trial; and it further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendant.

This constitutes the Decision and Order of the Court.

Dated: 4-18-14

Enter:

PAUL WOOTEN, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**