

<b>Berberich v Rental Mgt. Corp.</b>
2014 NY Slip Op 31095(U)
March 17, 2014
Sup Ct, Bronx County
Docket Number: 7298/00
Judge: Mary Ann Brigantti-Hughes
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

MAR 24 2014

ALAN BERBERICH and MELBA O'BRIEN,

X

Plaintiffs,

DECISION/ORDER

-against-

Index No.: 7298/00

RENTAL MANAGEMENT CORP. and  
ROBERT HEIMANN,

Defendants.

X

The following papers numbered 1 to read on the below motions noticed on October 24, 2013 and duly submitted on the Part IA15 Motion calendar of **January 24, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def. Affirmation in Support of Motion, Exhibits, Memo. of Law	1,2
Aff. In Opp., Exhibits	3,4
Cross-Motion, Exhibits	5,6
Def. Aff. In Opp. To Cross-Motion	7
Def. Aff. In Reply	8

Upon the foregoing papers, the defendants Rental Management Corp. and Robert Heimann ("Defendants") move pursuant to CPLR 3211(a)(7), dismissing the complaint of the plaintiffs Alan Berberich ("Berberich") and Melba O'Brien ("O'Brien") (collectively "Plaintiffs"), or in the alternative, for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiffs oppose the motion and cross-move for leave to amend their complaint pursuant to CPLR 3025. Defendants oppose the cross-motion.

I. Background

This is an action seeking damages for personal injuries arising out of alleged trip-and-fall incidents that occurred on the premises located at 2263 Morris Avenue, Bronx, New York on February 3, 1997. At the time of this incident, both plaintiffs were detectives with the New York City Police Department. According to Berberich, he and his partner, co-plaintiff O'Brien, were on the premises around midnight looking for a person of interest. Berberich's attention was brought to an individual standing in front of the property that fit the description of the person

they were looking for. As he stopped his patrol car and opened the door, the person ran into the premises. The officers pursued the person on foot through the building vestibule, lobby, and up an interior staircase, and onto the roof. The individual proceeded down a ladder off of the roof and to the fire escape, and the Plaintiffs followed him down. Berberich testified that he tried to climb over onto the drop-ladder of the fire escape to get to the ground, however, he got caught in a clothesline and fell. He did not recall if he fell while trying to release the fire escape's drop ladder.

O'Brien confirmed at deposition that the plaintiffs were chasing an individual through the building. She did not see Berberich's accident. O'Brien testified that she got to the drop ladder to "unhook it" but then suddenly found herself on the ground. She did not recall whether she became tangled in any clothesline prior to the accident. O'Brien testified that she did not know what caused her to fall.

Robert Heimann testified on behalf of the defendants, as the owner of the property and the president of Rental Management Corp. He testified that there was a resident supervisor on site whose duties included cleaning the sidewalks and hallways, and making sure no one was on the roof or fire escapes. He acknowledged that the building was subject to receiving violations for debris on the fire escapes, but did not think that the building ever received any such citations. Mr. Heimann himself would perform inspections of the property a few times a week. He acknowledged that a couple of times a year, he would have to tell a tenant to remove an item from a fire escape such as flower pots, bicycles, and other household items. He did state, however, that tenants would not hang clotheslines from fire escapes.

Defendants argue that they are entitled to dismissal of this action because the plaintiffs have failed to demonstrate that (1) there were any dangerous or defective conditions present at the time of these incidents, (2) that the defendants created, or had actual or constructive notice of the alleged conditions, or (3) that the conditions were the proximate cause of these incidents. Mr. Heimann testified that a superintendent would regularly inspect the fire escapes and there were no problems with them. Defendants therefore argue that they did not create, nor did they have any actual or constructive notice of an allegedly hazardous condition. As for Plaintiff O'Brien, Defendants make the same notice arguments, and further contend that her complaint must be dismissed since she could not identify what caused her to fall at deposition.

Plaintiffs argue that Defendants have not satisfied their initial burden of proving lack of notice as a matter of law. Moreover, there are triable issues of fact that must preclude entry of summary judgment. In their cross-motion, Defendants seek leave to amend their complaint to add claims predicated on General Municipal Law §205-e. Plaintiffs oppose the cross-motion, arguing that they will be prejudiced by the amendment, and that the proposed amendment lacks merit.

II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46<sup>th</sup> Street Development LLC.*, 101 A.D.3d 490 [1<sup>st</sup> Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire’s Hospital*, 82 N.Y.2d 738,[1993]).

III. Applicable Law and Analysis

*Defendants’ Motion for Summary Judgment*

To impose liability upon a landowner in a premises liability-related action, there must be evidence that a dangerous or defective condition existed and that the defendant either created or had actual or constructive notice of the condition (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d

967 [1994]). To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it. (*see Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 [1986]). The notice required must be more than general notice of any defective condition. (*Id.*) The law requires notice of the specific condition alleged at the specific location alleged. *Id.*

Importantly, it is not the plaintiff's burden in opposing a motion for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendant's burden to establish lack of notice as a matter of law (*Giuffrida v. Metro N., Commuter R.R. Co.*, 279 A.D.2d 403, 404 [1<sup>st</sup> Dept. 2001]). Such a moving defendant must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed (*Id.*).

Upon the papers submitted, Defendants have failed to satisfy their initial burden of establishing lack of notice as a matter of law, inasmuch as their witness Robert Heimann had no personal knowledge of the condition of the allegedly defective condition as of the date of this particular accident. Although he testified that the building superintendent would inspect the fire escapes regularly, Mr. Heimann only inspected the fire escapes himself when he was at the building, "a couple of times a week." Moreover, the defendant provides no evidence, e.g., a maintenance schedule, indicating that the fire escapes were cleaned regularly, or any other evidence of when they were last inspected (*Moore v. 793-797 Garden St. Housing Dev. Corp.*, 46 A.D.3d 382 [1<sup>st</sup> Dept. 2007] citing *Porco v. Marshall's Dept. Stores*, 30 A.D.3d 284 [1<sup>st</sup> Dept. 2006]; *c.f. Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499 [1<sup>st</sup> Dept. 2008]). The fact that the fire escapes were routinely inspected or cleaned does not in itself entitle Defendants to summary judgment on the issue of notice, absent evidence that the cleaning or inspection schedule was actually followed on or near the date of the incident (*see Gautier v. 941 Intervale Realty LLC.*, 108 A.D.3d 481 [1<sup>st</sup> Dept. 2013]).

As to plaintiff O'Brien, she testified that while pursuing the person of interest, "[t]here was all kinds of debris. I remember tripping on something; there was a lot of stuff" and she "really wasn't looking" at what kind of debris was in the area while in pursuit of the suspect. While O'Brien could not specifically state what caused her to fall, her testimony as a whole is

sufficient circumstantial evidence to raise an issue of fact as to whether her fall was caused by a defective condition (*Rodriguez v. Leggett Holdings LLC.*, 96 A.D.3d 555 [1st Dept. 2012]; *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 439 [1st Dept. 2010]).

*Plaintiff's Cross-Motion for Leave to Amend*

Plaintiffs have filed a cross-motion for leave to amend their complaint pursuant to CPLR 3025(b) to include causes of action under General Municipal Law §205-e. Plaintiffs contend that this amendment has merit on its face, because it is alleging violations of New York Multiple Dwelling Law, New York City Admin. Code, State Uniform Fire Prevention and Building Code, and New York Multiple Residence Law. Defendants oppose the motion, arguing that they would be prejudiced by the proposed amendment. Defendants also argue that the proposed amendment is palpably insufficient or devoid of merit. Defendants contend that the plaintiffs cannot make out a prima facie case of negligence on the part of the Defendants, relying on their arguments made in support of their motion for summary judgment.

CPLR 3025(b) provides that “[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Generally, leave to amend a pleading is freely given and decision of whether to do so is committed to the discretion of the trial court, the exercise of which will not be lightly set aside. It is improvident, however, for a court to grant such leave if there is prejudice to the nonmoving party, the amendment plainly lacks merit, or where the new causes of action are palpably insufficient on their face. *See Centrifugal Associates, Inc. v. Highland Metal Industries, Inc.*, 193 A.D.2d 385 (1<sup>st</sup> Dept. 1993).

General Municipal Law § 205-e provides that a police officer can maintain a cause of action for a line-of-duty injury or death which “occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state ... or city governments or of any and all their departments, divisions and bureaus” ( see *Jones v. Fried*, 21 AD3d 1057, 1058 [2d Dept 2005] ). “To make out a claim under section 205-e, a plaintiff must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] was injured, and [3] set forth those

facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm" ( *Williams v. City of New York*, 2 NY3d 352, 363 [2004] [internal quotation marks and citation omitted]; see also *Sebastino v. New York City Transit Auth.*, 86 A.D.3d 432 [1st Dept. 2011] ).

In this matter, Plaintiffs have demonstrated that their proposed allegations under GML §205-e are facially sufficient, and Plaintiffs are therefore granted leave to serve the proposed amended complaint annexed to their cross-moving papers. Defendants have not adequately established prejudice, as they have not indicated that their preparation of the defense has been hindered, or that they have been prevented from taking some measure in support of their position (*Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 [1st Dept. 2007], quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 [1981] ). Moreover, "[m]ere delay is insufficient to defeat a motion for leave to amend" (*Kocourek v. Booz Allen Hamilton, Inc.*, 85 A.D.3d 502 [1st Dept. 2011]).

IV. Conclusion

Accordingly, it is hereby

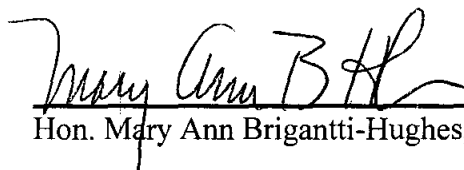
ORDERED, that Defendants' motion for summary judgment is denied, and it is further,

ORDERED, that Plaintiffs' cross-motion for leave to serve an amended complaint is granted, and it is further,

ORDERED, that Plaintiffs are directed to serve their amended complaint, annexed to the cross-moving papers, within 30 days of entry of this Order, in accordance with the CPLR.

This constitutes the Decision and Order of this Court.

Dated: 3/17, 2014

  
Hon. Mary Ann Brigantti-Hughes, J.S.C.