

**Cintron v Catholic Charities of the Archdiocese of
N.Y.**

2014 NY Slip Op 31962(U)

July 28, 2014

Sup Ct, New York County

Docket Number: 100790/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

SOCORRO CINTRON,

INDEX No. 100790/12

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 004

CATHOLIC CHARITIES OF THE ARCHDIOCESE
OF NEW YORK AND KATERI RESIDENCE,

Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2

Answering Affidavits- Exhibits 3, 4

Replying Affidavits _____

FILED

CROSS-MOTION: YES NO

JUL 29 2014

Upon the foregoing papers, it is ordered that this motion

**COUNTY CLERK'S OFFICE
NEW YORK**

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 7/28/14

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
SOCORRO CINTRON,

Plaintiff,

Index No.

-against-

100790/12

CATHOLIC CHARITIES OF THE
ARCHDIOCESE OF NEW YORK AND
KATERI RESIDENCE,

Defendants.

FILED

-----X
DONNA MILLS, J. :

JUL 29 2014

In this personal injury action, defendants, ~~Catholic Charities of the Archdiocese of New York~~ ^{COUNTY CLERK'S OFFICE} ~~Catholic Charities of the Archdiocese of New York and Kateri Residence~~ ^{NEW YORK} (hereinafter collectively referred to as "Kateri Residence or defendants"), move for an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability dismissing the plaintiff, Socorro Cintron's complaint. Defendants also seek to strike portions of the plaintiff's Supplemental Bill of Particulars and Second Supplemental Bill of Particulars, and to preclude plaintiff from seeking compensatory and punitive damages for alleged violations of PHL § 2801-d. Plaintiff opposes the motion and cross-moves for leave to serve a Supplemental Summons and Amended Complaint so as to properly plead a violation of § 2801-d of the Public Health Law.

The instant case involves an accident sustained by plaintiff on November 23, 2011. The accident occurred when plaintiff was attempting to use a toilet located in Room 1412 in defendants' rehabilitation facility when the safety handrail affixed to the wall pulled off causing her to fall and sustain injuries. The verified bill of particulars alleges that Kateri Residence was negligent in its maintenance of the bathroom

handrail in Room 1412, and failed to provide sufficient nursing staff to care for the plaintiff. Plaintiff further alleges that Kateri Residence had actual and constructive notice of the loose handrail in Room 1412, which is alleged to have been a dangerous and defective condition.

The defendants contend that it did not create, or have actual or constructive notice of the alleged dangerous condition. Defendants assert that there is no evidence in the record which would tend to show that the defendants knew that there was a defect in the subject handrail. Defendants also allege that there is no evidence in the record that a dangerous condition existed before the plaintiff was injured on the date in question.

In support of its motion for summary judgment defendants submit an affidavit of Michael Monahan, a former Kateri Residence administrator from September 2010 - September 2013. Mr. Monahan states in his affidavit that prior to the plaintiff's incident, Kateri Residence had not experienced any incidents involving bathroom handrails dislodging from the wall. Additionally, he claims that prior to November 23, 2011, Kateri Residence had not received any complaints as to the looseness, insufficiency, or instability of any bathroom handrails. He further stated that Kateri Residence's maintenance staff made periodic inspections of the bathroom handrails, including the handrail in the bathroom of Room 1412, and no defects were found.

In support of its motion for summary judgment defendants also rely on plaintiff's deposition testimony where she testified that before the November 23, 2011 incident, she had never had any problems with, nor made any complaints about the bathroom handrails at Kateri Residence. As such, Kateri Residence maintains that it did not have

actual notice of the hazardous condition alleged by plaintiff.

Defendants contend that the deposition testimony of the plaintiff and the affidavit of its former administrator refute the plaintiff's contention that the defendants created or had actual or constructive notice of the allegedly dangerous condition. Defendants also assert that any defect to the subject handrail in Room 1412 would not have been detected by any reasonable inspection of the handrail.

In opposition, plaintiff annexed an Architect's Supplemental Report to her opposition, in which architect Steven Zalben opined that the handrail in Room 1412 could have loosened or deteriorated over time and that an inspection would have revealed possible defects. Plaintiff also asserts that the deposition testimony of the parties demonstrates that the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law because there are triable issues of fact as to whether or not the defendants had constructive notice of the dangerous condition of the handrail. Plaintiff contends that although Mr. Monahan stated in his affidavit that Kateri Residence's maintenance staff made periodic inspections of the facility's bathroom handrails, including the handrail in the bathroom of Room 1412, defendants failed to produce any materials relating to regular inspection and maintenance proceedings at the site of plaintiff's accident. Their Discovery Response merely stated that there are no maintenance and repair records in existence for the occurrence site for a period of two years prior thereto.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the

existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see *Zuckerman v City of New York*, 49 NY2d 557[1980]).

A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (see *Betz v Daniel Conti, Inc.*, 69 AD3d 545 [2d Dept. 2010]; *Roy v City of New York*, 65 AD3d 1030 [2009]). A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a case involving a defective condition on the property 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 (see *Schnell v Fitzgerald*, 95 AD3d 1295 [2d Dept. 2012]).

Upon review and consideration of the defendants' motion, this Court finds that the evidence submitted by the defendants is not sufficient to demonstrate, prima facie, that the defendants did not have constructive notice of a defective condition of the handrail prior to the plaintiff's accident.

This Court agrees with the plaintiff that there is a question of fact as to the nature and reasonableness of the inspection conducted by the defendants. There is a question as to whether the defect was discoverable by reasonable inspection and whether the defendants' manner of inspection of the handrail in the facility was adequate and reasonable. Therefore, this Court finds that there is a question of fact as to whether the defendants failed in its obligation to make a reasonable inspection (see *Hoffman v United Methodist Church*, 76 AD3d 541[2d Dept. 2010]; *Colon v Bet Torah, Inc.*, 66 AD3d 731 [2d Dept. 2009])[if a reasonable inspection would have disclosed the

[* 6]

dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition)). In addition, the Court finds that the defendant failed to sufficiently document when the last inspection took place. Although defendants stated that the handrails were routinely inspected, there was no evidence produced as to when the handrails were last inspected. Therefore, defendants failed to establish as a matter of law that the defect did not exist for a sufficient period of time to allow defendants to discover and remedy it [see *Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406 [4th Dept. 2008]].

Thus, absent specific evidence of when the handrail was last inspected, the reasonableness of the inspection, or that an inspection would not have disclosed the defect, the defendants have failed to establish that it lacked constructive notice of the handrail's allegedly defective or dangerous condition or that it was free of negligence with respect to it (see *Oates v Iacovelli*, 80 AD3d 1059 [3d Dept. 2011]; *White v Village of Port Chester*, 84 AD3d 946 [2d Dept. 2011]; *Colon v Bet Torah, Inc.*, 66 AD3d 731 [2d Dept. 2009]; cf. *Lee v. Bethel First Pentecostal Church of Am., Inc.*, 304 AD2d 798 [2d Dept. 2003]).

As defendants failed to establish its entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of the opposition papers submitted by the plaintiff (see *Giraldo v Twins Ambulette Serv., Inc.*, 946 NYS2d 871 [2d Dept. 2012]; *King v 230 Park Owners Corp.*, 95 AD3d 1079 [2d Dept. 2012]; *Hill v Fence Man, Inc.*, 78 AD3d 1002 [2d Dept. 2010]).

Defendants also seek an order striking portions of plaintiff's Second Supplemental Bill of Particulars on the ground that it improperly alleges new theories of

liability and new injuries. It is well settled that a supplemental bill of particulars may be used for purposes of updating claims of continuing special damages and disabilities, but may not be used for adding new injuries or damages. Generally, evidence of injuries or conditions not enumerated by the plaintiff in their bill of particulars will not be permitted at trial unless it flows immediately and necessarily from the information conveyed in the bill of particulars or the record reveals that the defendants should have known of such injury or condition (*Schreiber v University of Rochester Medical Center*, 74 AD3d 1812 [4th Dept. 2010]).

Here, on August 23, 2013, plaintiff served a Second Supplemental Bill of Particulars which alleged, in pertinent part, that defendants were negligent in failing to install or provide grab bars sufficient to withstand 250 pounds of force. Within her initial Bill of Particulars, dated May 8, 2012, plaintiff alleges that defendants were negligent in failing to provide a handrail suitable for the weight of the plaintiff. In view of this allegation, defendants were put on notice that plaintiff claimed that the handrail was not sufficiently weight bearing. As such, this Court finds that the Second Supplemental Bill of Particulars merely set forth the original claim with greater specificity and does not constitute a new theory of liability.

Plaintiff does however withdraw the claims of a violation of the American Disabilities Act as set forth in her Second Supplemental Bill of Particulars. Plaintiff also withdraws any and all claims asserted as concerns lumbar injuries.

Plaintiff cross-moves for leave to serve a Supplemental Summons and Amended Complaint so as to assert a cause of action alleging a violation of Public Health Law Section 2801-d, which provides for compensatory damages upon a finding that a

patient has been deprived of a right or benefit and that the patient has been injured as a result. It also states that punitive damages may be assessed where the deprivation is found to be wilful or in reckless disregard of the lawful rights of the patient.

In the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given (see CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit (see *Bernardi v Spyratos*, 79 AD3d 684, 688 [2010]). A party opposing leave to amend “must overcome a heavy presumption of validity in favor of [permitting amendment]” (*Otis El. Co. v 1166 Ave. Of Ams. Condominium*, 166 AD2d 307 [1990]). Prejudice to warrant denial of leave to amend requires “ ‘some indication that the defendant[s] ha[ve] been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position’ ” (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [2011]). “Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position” (*Valdes v Marbrose Realty*, 289 AD2d 28, 29 [2001]).

Plaintiff’s initial Bill of Particulars alleged a violation of the foregoing section of the Public Health Law. However, plaintiff did not plead this violation as a separate cause of action. As such, this Court finds that the proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that the amendment, which merely adds a new theory of recovery, that was initially revealed in the Bill of Particulars, would prejudice or surprise the defendant (see *Medical Arts Off. Servs., Inc. v Erber*, 89 AD3d 698 [2011]). However, this Court finds that there is no merit found in the record to support the theory that would warrant punitive damages

against the defendants. In the instant matter, the conduct alleged to have caused plaintiff's injury and to have violated PHL § 2801-d does not rise to the level of intentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious act that willfully and wantonly disregards rights of another (*Gamiel v Curtis & Reiss-Curtis, P.C.*, 16 AD3d 140 [2005]). As such, the claim for punitive damages is stricken from the Amended Complaint.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that defendants' motion to strike portions of the plaintiff's Supplemental Bill of Particulars and Second Supplemental Bill of Particulars, is granted only as to the claims withdrawn by the plaintiff; and it is further

ORDERED that plaintiff's cross motion for leave to amend her complaint to file a Supplemental Summons and Amended Complaint is granted, and the Supplemental Summons and Amended Complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the Amended Complaint within 20 days from the date of said service.

DATED: 7/28/14

FILED

JUL 29 2014

COUNTY CLERK'S OFFICE
NEW YORK

ENTER: 7/28/14
[Signature]

J.S.C.