

Grogul v Parkchester S. Condominium

2014 NY Slip Op 32535(U)

March 3, 2014

Supreme Court, Bronx County

Docket Number: 300627/2009

Judge: Alison Y. Tuitt

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3/10/2014

PART 05

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA _____ X

Thosul

Index No. 300627/09

Hon. ALISON Y. TUITT,
Justice

- against -

Parkchester South X

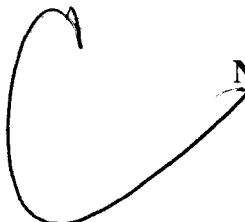
The following papers numbered 1 to 3 Read on this motion, Summary Judgment
Noticed on 6/3/13 and duly submitted as No. on the Motion Calendar of 11/18/13

	<u>PAPERS NUMBERED</u>
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1</u>
Answering Affidavit and Exhibits-----	<u>2</u>
Replying Affidavit and Exhibits-----	<u>3</u>
Affidavit-----	_____
Pleadings - Exhibit-----	_____
Stipulation - Referee's Report --Minutes-----	_____
Filed papers-----	_____
Memoranda of Law-----	_____

Upon the foregoing papers this motion is decided in
accordance with the annexed
memorandum decision

Dated: 3/3/2014

Hon. A. Y. Tuitt
ALISON Y. TUITT, J.S.C.



NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

DANIEL GROGUL and MARIA GROGUL,

INDEX NUMBER: 300627/2009

Plaintiffs,

-against-

Present:
HON. ALISON Y. TUITT
Justice

THE PARKCHESTER SOUTH CONDOMINIUM,
INC., PARKCHESTER PRESERVATION
COMPANY, L.P., PARKCHESTER PRESERVATION
MANAGEMENT, LLC and SUPERVISORY
MANAGEMENT CORP.,

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of 11/18/13

Notice of Motion-Exhibits and Affirmation	<u>1</u>
Affidavit in Opposition and Memorandum of Law	<u>2</u>
Reply Affirmation	<u>3</u>

Upon the foregoing papers, defendants' motion for summary judgment is denied for the reasons set forth herein.

The within action involves plaintiff Daniel Grogul's claim that he was injured on June 27, 2006 at the defendant's premises located at 2055 McGraw Avenue, Bronx, New York, when he twisted his ankle and fell while in the course of his employment as a firefighter with the New York City Fire Department. Plaintiff claims that he was injured as a result of tripping hazards present on the compactor room floor where he was engaged in firefighting. Plaintiff alleges that the dangerous conditions were concealed by an accumulation of

water due to improperly functioning drains in the compactor room. Defendants move for summary judgment arguing that it did not violate any statute, ordinance or law which would establish liability pursuant to General Municipal Law §205-a. Defendants further contend that there is no evidence that it had any notice of any dangerous or defective condition which proximately caused plaintiff's injuries. Defendants argue that plaintiff's reasons for his injury: a metal plate on the floor in the compactor room; water on the floor in the compactor room; and debris on the floor in the compactor room do not constitute a condition precedent to liability pursuant to General Municipal Law §205-a. Defendants further argue that the deposition testimony of numerous firefighters establishes that it was normal for water and debris to be on the floor when a fire is being extinguished in a compactor room. Finally, defendants contend that inspections of the compactor room would not have led to any violations based upon the metal plate on the floor which plaintiff believes may have caused his injuries.

Plaintiff testified at his deposition that on the date of the accident, he was working with Engine 64. Ladder 41 and Engine 64 were called to the subject premises for a compactor fire. Plaintiff was the first firefighter to enter the compactor room and was met by a large gush of water that had build up in the room. He noticed debris floating in the water, specifically, bottles, cans, paper and cardboard. The water was three to four inches deep, covering his feet and the entire floor of the room. Plaintiff testified that there were two sprinkler heads in the compactor room; one inside the compactor itself and one inside the room. The sprinkler inside of the compactor did not turn off, resulting in the water continuing to flow. Plaintiff further testified that his injury was caused by stepping on an unstable floor. The injury occurred when he stepped onto an uneven surface on the compactor floor, twisted his ankle, and fell to one knee. He believes that he stepped into a hole, which he assumed at the time was a drain. Plaintiff explained that his ankle twisted outward when it fell from a higher area to a lower area on the floor. He could not observe the floor to see what specifically caused him to fall because of the accumulation of water and because of the smoke condition in the room. Plaintiff concluded that the room flooded because the debris in the compactor room clogged the drain, since the water being discharged from the sprinkler head would not have been enough to flood the room if the drain had been functioning properly. Plaintiff also testified that prior to this accident, he had been involved in inspecting compactor rooms of multiple dwellings to ascertain whether they were in compliance with the Building Code of the City of New York. In terms of a compactor room, the inspection would include looking at lighting and sprinklers. Plaintiff

testified that a compactor room is a room where there is a shaft way to throw garbage down, which leads to the basement and a compactor then compacts the garbage.

In the Member Injury Report or CD-72, the official Incident Report prepared by the Fire Department of the City of New York for this fire, Battalion Chief Kevin T. Loughlan reported: "While operating at a fire in a compactor room where sprinkler heads were discharging Lt. Grogul sustained an injury to his left ankle. The floor of the compactor room was covered in approximately 3 inches of water. While attempting to contain the fire and shut power down to the compactor unit Lt. Grogul suffered an injury to his left ankle when he stepped in an eight inch drainage depression under the surface of the water." Chief Loughlan also testified at a deposition that he was in charge of inspecting compactor rooms in apartment buildings within the City of New York. He testified that compactor rooms should be inspected to determine whether the sprinkler system is operational and whether there is a garden hose located in the compactor room to put out an incipient fire. If there was a violation of rules pertaining to compactors, a violation would be issued. With respect to responding to a compactor room fire, the procedures for extinguishing the fire can include shooting water directly down the chute of the compactor while firefighters move garbage around on the floor which would commonly result in water on the floor of the compactor room. Chief Loughlan was shown a photograph of the metal plate located on the floor and testified that a violation would not be issued for such a metal plate on the floor of a compactor room.

The firefighters involved in fighting the fire at the subject premises were deposed as non party witnesses. Lieutenant Joseph Beltrani was shown photographs of the metal plate in the compactor room at his deposition, and testified that he believed the place that was located on the floor was placed there when the compactor was installed or retrofitted so that the old floor would meet up with the new floor. Edward Schmitt, another firefighter, testified that he had conducted inspections of many compactor rooms which consisted of a visual walk-through to make sure that there was a working hose in the compactor room and ensuring the room is not cluttered. With regard to tripping hazards, firefighter Schmitt testified that tripping hazards would consist of refuse and debris rather than anything else. Additionally, he testified that there is normally an accumulation of water on the floor when the fire is being put out in a compactor. Firefighter David Collado testified that, with respect to a compactor fire, the hose line stretched into the building or the garden hose in the compactor room would be utilized to put out the fire. After being shown a photograph of the metal plate, he testified that the

plate does not present a problem or constitute a tripping hazard that he would report back to his Chief.

Defendants also submit the affidavit of Shawn Rothstein, an engineer, who states that there were no violations of any of the applicable statutes or codes.

Vincent Adovasio, Director of Operations for defendants, testified at a deposition that the drains in the compactor room are maintained by porters. Mr. Adovasio testified that the compactor room has two sprinklers inside the room, one located inside the compactor room and the other located in the compactor machine, which is situated inside the hopper. The sprinkler in the hopper was replaced following the fire as it went off as a result of the fire inside the compactor itself. The sprinkler outside the machine was not replaced after the fire because, according to Mr. Adovasio, the heat of the fire never got strong enough for it to go off. Mr. Adovasio also testified that the drains in the compactor room are located underneath the conveyor belt. There is a hose located in the fire compactor room which is not to be used by the porters, but which can be used by fire personnel, in addition to the sprinklers. Mr. Adovasio testified that he imagined the drain was serviced daily, but was unaware if the drain had been serviced or repaired by a plumber at any time prior to June of 2006. Mr. Adovasio also indicated that the floor in the compactor room existed in the same condition from long before his time.

In opposition, plaintiff argues that for purposes of recovery under §205-a, plaintiff need only show that any uncorrected violation of any code provision, directly or indirectly, resulted in his injury. Plaintiff claims he was injured due to the tripping hazards present on the compactor room floor that were concealed by an accumulation of water. This accumulation of water resulted from alleged improperly functioning drains in the compactor room. Plaintiff testified that when he entered the compactor room, he was met by a large gush of water that had built up in the room, with debris floating all around. According to his testimony, the accident occurred when he stepped on an unstable and uneven floor. Plaintiff could not observe the floor to see what specifically caused him to fall because of the accumulation of water and the smoke condition in the room. Plaintiff further surmised that the room flooded because the debris in the compactor room clogged the drain, since the water being discharged from the sprinkler head would not have been enough to flood the room if the drain had been functioning properly.

Plaintiff also submits the affidavit of Stanley Fein, a professional engineer, who opines that "... the only manner in which water would have been retained in the basement area is if the drainage was not

adequate and not properly cleaned out so that it was plugged and permitted water to accumulate on the basement floor, therefore camouflaging tripping hazards in the compactor room.” Mr. Fein’s inspection of the room revealed that the concrete floor of the compactor room “... was broken and uneven and had many deteriorated sections which were extreme tripping hazards. There would have been camouflaged by the water that accumulated in the compactor room due to the inadequate drainage” which is a violation of the Rules of the City of New York Section 25-211(f). Mr. Fein also opines that the floor of the compactor room itself had tripping hazards in addition to the condition of the concrete floor. At the time of his inspection, the installation of the compactor was in a different configuration than it was on the date of the accident. However, he was able to review photographs of the compactor room which shows its condition at the time of plaintiff’s accident. Mr. Fein states that “[t]he photographs clearly demonstrate that there were tripping hazards associated with the compactor equipment, including the bracket that held the rollers in place and an electrical conduit that was running alongside the rollers.” These tripping hazards would have also been concealed by the accumulation of water from the inadequate drainage. It is Mr. Fein’s opinion that the failure to have adequate drainage in the compactor room, the broken, uneven, deteriorated condition of the concrete floor, and the presence of the tripping hazards, including the bracket and electrical conduit, together or by themselves, violated Sections 27-127 and 27-128 of the 1968 Building Code.

The court’s function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion)

shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

General Obligations Law §11-106 provides as follows:

In addition to any other right of action or recovery... whenever any police officer or firefighter suffers any injury... while in the lawful discharge of his official duties and that injury... is proximately caused by the neglect... of any person or entity, other than that police officer's or firefighter's employer or co-employee... that police officer or firefighter suffering that injury... may seek recovery and damages from the person or entity whose neglect, willful omission... or culpable conduct resulted in that injury."

Thus, §11-106 obliterated the restriction for recovery under the "firefighter's rule" for common law negligence claims against private entities. The Court of Appeals has confirmed that "... the lawmakers enacted General Obligations Law §11-106, which largely abolishes the firefighter's rule by giving firefighters and police officers a cause of action in negligence for injuries suffered while in the line of duty".. Giuffrida v. Citibank Corp., 100 N.Y.2d 72 (2003).

Plaintiff alleged a statutory cause of action pursuant to General Municipal Law §205-a which provides as follows:

Section 205-a. Additional Right of Action to Certain Injured or Representatives of Certain Deceased Firemen.

In addition to any other right of action or recovery under any other provision of law, in the event of any accident causing injury, death, 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 the Federal, State, County, Village, Town or City Governments, or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable...

Thus, Section 205-a underscores a broad, liberal mandate for recovery. Pursuant to this statute, when any person, whether an owner of property or one in control thereof, violates any statute, ordinance, rule, order or regulation and such violation causes, either directly or indirectly, injury to a firefighter, that person is absolutely liable. See Nykanen v. City of New York, 14 N.Y.2d 697 (1964); McGee v. Adams Paper & Twine Co., 271 N.Y.S.2d 698 (1st Dept. 1966), *aff'd*, 20 N.Y.2d 921 (1967)(Liability exists where there is “any practical or reasonable connection between a violation” and injury); Johnson v. Riggio Realty Corp., 544 N.Y.S.2d 589 (1st Dept. 1989)(§205-a is a special statute analogous to §240 of the Labor Law and imposes absolute liability upon owners who violate their non-delegable duties).

Here, plaintiff has alleged that defendants violated provisions of the Administrative Code, including New York City Building Code §§27-127 and 27-128. Section 27-127 provides that:

All buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered or repaired, shall be maintained in good working order.

Section 27-128 provides that: “The owner shall be responsible at all times for the safe maintenance of the building and its facilities.” Plaintiff has also alleged that defendants violated Section 27-2005 of the Housing Maintenance Code of the City of New York which provides that: “The owner of a multiple dwelling shall keep the premises in good repair.” Additionally, plaintiff alleges that defendants violated Multiple Dwelling Law §78 which states that

1. Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be responsible for compliance with the provisions of this section; but the tenant also shall be liable if a violation is caused by his own willful act, assistance or negligence or that of any member of his family or household or his guest. Any such person who shall willfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties provided in section three hundred four.

Plaintiff also claims violations of the Rules of the City of New York which address the construction and maintenance of refuse rooms such as the one that plaintiff sustained his injuries. 1 RCNY §24-

01 Construction and Maintenance of Refuse Chutes and Refuse Rooms provides:

(f) Collection room floors. The floor within the room for the collection of refuse shall be constructed of concrete and shall be sloped to a floor drain within the room connected to the house drain. The drain shall be provided with a protective screen to retain solid material. Floor drain traps shall be readily accessible for cleaning.

28 RCNY §25-211 Construction and Maintenance of Refuse Chutes and Refuse Rooms provides:

(f) Collection room floors. The floor within the room for the collection of refuse shall be constructed of concrete and shall be sloped to a floor drain within the room connected to the house drain. The drain shall be provided with a protective screen to retain solid material. Floor drain traps shall be readily accessible for cleaning.

Defendants' motion for summary judgment must be denied. Plaintiff has raised an issue of fact as to whether the water that had accumulated on the floor of the compactor room came from the sprinkler system, which accumulation resulted from an improper maintenance of the drains in the room. Plaintiff has also raised an issue of fact whether the water accumulation masked the presence of uneven portions of the floor near the drain and whether the collection of various other trip hazards presented in the compactor room. There is a question of fact as to whether defendants failed to properly clean and maintain the drains, thus rendering the drains inadequate to handle the water from the sprinkler system, and whether the alleged failure to do so was negligent. Here, plaintiff alleges that defendants violated several statutes and ordinances regarding the failure to properly maintain the drain in the compactor room and by allowing the floor around the drain to remain in a broken, uneven and hazardous condition. Plaintiff described in detail how his ankle twisted when he stepped on the uneven surface of the compactor room floor. He assumed he stepped into a hole as he could not observe the floor because the accumulation of water prevented him from doing so.

Defendants' contention that the water in the room came from water being poured into the compactor chutes during the firefighting and debris being strewn about by the firefighters themselves in an effort to put out the fire is belied by plaintiff's own testimony that the water was in the room when he first entered the room, and he was the first firefighter to enter the compactor room. Additionally, his testimony that he observed debris, specifically bottles, cans, paper and cardboard already floating in the water when he entered the room, belies defendants' contention that the firefighters created this condition, as at the point plaintiff first entered the room and observed these conditions, no firefighting had yet commenced. Furthermore, in Chief

Loughlan testimony regarding the accumulation of water during a firefighting operation in a compactor room, he was speaking in general terms of one particular type of firefighting operation, not of this particular fire specifically. Here, the testimony revealed that three to four inches of water had already accumulated in the compactor room before the firefighters even arrived at the scene.

Moreover, plaintiff's expert raises an issue of fact as to whether the drainage in the compactor room was inadequate and improperly cleaned thereby permitting water to accumulate, masking the alleged tripping hazards in the room. Mr. Fein's inspection revealed broken, uneven and deteriorated sections of the floor which he found to be extreme tripping hazards. He opined that these conditions were in violation of several statutes and ordinances. In addition, his review of the photographs of the compactor room as it appeared on the date of the accident, led him to opine that there were tripping hazards associated with the compactor equipment, which would have been concealed by the accumulation of water from the inadequate drainage. Mr. Fein's opinion that the failure to properly maintain the drain and the condition of the compactor room floor violated defendants' non-delegable duty to maintain the building in a safe manner at all times and that these violations directly caused plaintiff's injury raises issues of fact which preclude summary judgment. In order to recover, plaintiff need only show that any uncorrected violation of any code provision directly or indirectly resulted in his injury and, with his submissions in opposition, plaintiff has raised issues of fact which must be decided by a jury.

Accordingly, defendants' motion for summary judgment is denied.

This constitutes the decision and Order of this Court.

Dated: 3/3/2014



Hon. Alison Y. Tuitt