

Peralta v Webster Place Assoc., L.P.

2014 NY Slip Op 33731(U)

March 28, 2014

Supreme Court, Bronx County

Docket Number: 7412/07

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No. 7412/07
Motion Calendar No. 18
Motion Date: 1/22/14

DYLAN PERALTA, an infant under the age of 14 by his
mother and natural guardian, RAISA LUCIANO, and
RAISA LUCIANO, Individually, ,

Plaintiff,

-against-

DECISION/ORDER

Present

Hon. Wilma Guzman

Justice Supreme Court

WEBSTER PLACE ASSOCIATES, L.P.,
Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits thereto.....	1
Affirmation in Opposition of Motion and Exhibits thereto	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, following oral argument, the Decision/Order on this motion is as follows:

Defendant moves this Court for summary judgment to dismiss the plaintiff complaint on the grounds that defendant did not cause or created the defective condition that caused the plaintiffs accident nor did defendant have actual or constructive notice of any defective condition. Plaintiff opposes the defendant's motion. At the outset, this Court notes that defendant's motion for summary judgment is timely as the Court rules limiting the time for summary judgment to 60 days did not go into effect until January 2, 2013, after the Note of Issue had been filed.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained to infant plaintiff was injured in the laundry room on the premises owned by defendant and located at 1971 Webster Avenue, Bronx, NY.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986) and Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her

day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. See, Assaf v. Ropog Cab Corp., 153 A.D.2d 520 (1st Dept., 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. See, Rose v. Da Ecib USA, 259 A.D.2d 258 (1st Dept., 1999). Summary judgment will only be granted if there are no material, triable issues of fact. See, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957).

Defendants argues in the motion for summary judgment, that no liability exists as it did not create the allegedly dangerous condition nor did it have actual or constructive notice of the allegedly dangerous condition.

Plaintiff Raisa Luciano testified that she has been a tenant living in the 1971 Webster Avenue for approximately five years. Infant plaintiff is her son. On April 17, 2005 she went to laundry room in the laundry room which is located on the first floor of the building. She uses the laundry room approximately once a month. On the date of the accident, she transported her laundry to the laundry room using a shopping cart. Her son, who was three at the time was with her. As she unloaded the machines and transferred clothes from the washer to the dryer, she placed her son in the shopping cart which was next to the folding table. She wheeled the car over to the another machine to put clothes in. The cart was over the drain which was approximately two feet in front of the machines. As she pushed the car back away from the machine, he wheel got stuck and infant plaintiff and the cart fell backwards to the floor. Plaintiff testified that the right front wheel of the cart got caught in the drain hole that was in the floor. Infant plaintiff began to wiggle when the cart started falling. There was no cover on the drain. She does not remember whether, prior to the day of the accident, she saw the hole before or whether the drain had been covered. Plaintiff Luciano testified that the Superintendent of the Building was Henry and she had seen him in the laundry room cleaning once.

Henry Benitez testified that he is the superintendent in the subject building. His duties including caring for the boilers and making minor repairs. His daily routine including taking out the garbage and sweeping the building and emptying out the compactor. He makes daily inspections of the building. Once in the morning around 11am and once in the evening around 8:00pm. This included inspecting the laundry room. If he saw the laundry room drain missing its cover he would, temporarily cover it, call Cornell Pace, the managing agent to order a replacement. If a tenant had a complaint about the building, they could inform him or call the office directly. He testified that the drain cover was not missing in April 2005. He further testified that he first called Lilly Mercado

of Cornell Pace, about the missing drain cover in march of 2006. He also observed someone take pictures of the drain in 2006, after the cover had been replaced.

In Pfeuffer v. New York City Hous. Auth., 93 A.D3d 470, the Appellate Division, First Department reviewed a case with similar facts to the case at bar. In Pfeuffer, the plaintiff argued that the accumulation of debris and liquids in the stairwell was a “routinely ignored recurring condition.” The First Department held that “a defendant cannot be expected to patrol its staircases 24 hours a day.” Pfeuffer at 473. The Appellate Division reasoned that even if the problem was recurring, NYCHA addressed it by cleaning daily and inspecting the stairs twice a day. Citing, DeJesus v. New York City Hous. Auth., wherein the defendant caretaker testified that he removed any improperly discarded garbage and cleaned the area twice a day, the Appellate Division noted that Pfeuffer was not a case in which the defendant negligently failed to take any measures to avoid the creation of a dangerous condition. Pfeuffer at 473 (internal citations omitted).

In the instant case, the defendant has submitted sufficient proof to meet the prima facie burden for summary judgment. Mr. Benitez testified that he inspected, cleaned and swept the building including the laundry room twice a day. Prior to the date of the accident, he had not observed the drain cover missing nor had he received any complaints about a missing drain cover in the laundry room. Indeed, plaintiff Luciano’s testimony indicates that she had not observed the missing drain prior to the date of the accident.

The unsworn statement of Yelitza Espinal and the affidavit of Johanny Santos are insufficient to raise a triable issue of fact as to whether the defendant caused or created the condition or had actual or constructive notice of the condition. Johannay Santos affirms that he is translating, from Spanish to English, the statement of Corrine De Los Santos, however, no such statement is attached to the opposition papers.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment is hereby granted and the plaintiff’s complaint is dismissed. It is further

ORDERED that defendant shall serve a copy of this Order with Notice of Entry upon plaintiffs within thirty (30) days of entry of the Order.

This constitutes the decision and order of this Court.

DATE **MAR 28 2014**



HON. WILMA GUZMAN, JSC.