

Grant v Milbank Real Estate Servs.

2015 NY Slip Op 30841(U)

April 27, 2015

Supreme Court, Bronx County

Docket Number: 307031/09

Judge: Mark Friedlander

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**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

FREDDIE GRANT,

Plaintiff,

MEMORANDUM DECISION/ORDER

Index No.: 307031/09

-against-

MILBANK REAL ESTATE SERVICES, NY-BRONX I, LLC, NY-BRONX II, LLC, NY-BRONX III, LLC, NY-BRONX IV, LLC and MONTEFIORE MEDICAL CENTER,

Defendants.

HON. MARK FRIEDLANDER

Defendants, Milbank Real Estate Services, NY-Bronx I, LLC, NY-Bronx II, LLC, NY-Bronx III, LLC, NY-Bronx IV, LLC (hereinafter collectively "Milbank"), move for an order, pursuant to CPLR§3212, dismissing plaintiff's complaint as a matter of law. Defendant, Montefiore Medical Center (Montefiore"), moves for an order, pursuant to CPLR§3212, dismissing plaintiff's complaint and any cross-claims with prejudice. The motions are consolidated for disposition and decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained by him as a result of an accident which occurred on June 29, 2007, as a result of a window having slammed shut on his foot. Plaintiff also asserts a claim of medical malpractice against Montefiore based on its rendering of treatment to plaintiff in connection with the aforementioned accident.

The Milbank defendants, in support of their motion, submit a copy of the pleadings, plaintiff's bill of particulars and supplemental bill of particulars, transcripts of the deposition testimony of plaintiff,

of Ray Radparvar (“Radparvar”) and of Dr. William Suggs, M.D. (“Suggs”), plaintiff’s medical records from his visit to Montefiore on July 4, 2007, and the affirmation of Dr. Xenophon Xenophontos (“Xenophontos”). In opposition to Milbank’s motion, plaintiff submits, *inter alia*, an affidavit from Gary Spilatro, RA (“Spilatro”), a registered architect, a physician’s affidavit sworn to the 2nd day of October, 2014, redacting the name of the physician¹, and a photograph.

The facts, as culled from the pleadings, deposition transcripts, affidavits and exhibits, are as follows: Plaintiff testified that his accident occurred at the premises designated as 2505 Aqueduct Avenue, Bronx, New York (the “Premises”). The Premises is a brick, five story building with six apartments on each floor. There is a hallway on each floor, containing approximately three windows. Peter Lopez (“Lopez”) was the Premises superintendent. Plaintiff performed work for Lopez on and off for approximately one and one half years, without compensation, helping because plaintiff was “being nice.” On the date of the accident, June 29, 2007, Lopez asked plaintiff to clean a patio area outside one of the windows. This involved picking up trash. The window involved in plaintiff’s accident opened up-and-down, not side-to-side. Plaintiff went through the opened window and cleaned the patio. He was leaving the patio, attempting to re-enter the Premises by going through the window, his left leg and body being back inside the hallway, when the window (which was located in the middle of the hallway, across from the elevators) fell down on his right foot. Plaintiff was not able to recall the dimension of the window or whether it had a wood or metal frame.

Plaintiff testified that, from the time the window fell on his foot, the foot was swollen and he was

¹The original signed, notarized and unredacted physician’s affidavit was submitted to the Court for in camera inspection.

in pain. It was getting worse over time. On July 4, 2007, plaintiff went to the Emergency Room of Montefiore for treatment. Plaintiff denied ever picking at a callous on his big toe.

Radparvar testified that he was employed by Milbank Real Estate Services from March 2008 through January-February 2011. The Premises was owned by Bronx I, LLC. Radparvar's responsibilities included repairs and day to day operations of five buildings, including the Premises. Milbank's procedures for making repairs included speaking with the superintendent of the Premises. If the superintendent could perform the repair, the superintendent would repair it. Radparvar, a certified electrician, also performed maintenance such as tiling, painting, sheetrock, metal work, carpentry and masonry, as well as overseeing a large staff of approximately sixty craftsman and handymen who would perform various repairs in the Premises when needed. Radparvar kept "certain logs" that he provided to the project manager. What these logs consisted of was not specified. The Premises and other properties owned by Bronx I, LLC went into receivership. These properties were eventually sold to a company in Scarsdale. Whatever records were in Milbank's possession, including repair logs, were turned over to the new owner.

With respect to the operation of the windows at the Premises, Radparvar gave the following testimony:

A. The windows, they have springs inside, and most of the times if the springs get stuck you would have to - - you know, usually they don't go - - they get stuck halfway, up and down. So when the windows get stuck you have to force them up and force them down. So you'd have to replace the springs that's inside the mechanism that goes up and down for it to go up and down easy.

Q. Does the window have - - did those windows have a spring mechanism in it?

A. Yes.

- Q. Sometimes the spring mechanism would come loose or - -
A. They get stuck, so the window gets stuck.
- Q. Can those spring mechanism get removed?
A. Yes.
- Q. Are some of those springs mechanism removed altogether from the windows?
A. In - - if they remove them, the window doesn't stay up.
- Q. Do you know any reason why they would remove a spring mechanism for a window at 2505 Aqueduct Avenue?
A. To replace it.
- Q. Other than to replace it, do you know of any other reason?
A. No, unless they vandalized the windows.
- Q. Do you know if you removed the spring mechanism at a 2505 Aqueduct Avenue window, if it was stuck down, it would then be able to be opened?
A. It would be able to be opened, but then it wouldn't stay up. You would have to brace it up.

(Tr. p. 44, lines 5 through 25, p. 45, lines 2 through 16).

- Q. Just to clarify in the previous questions that were just answered, you're not aware of any situation actually existing with the window in the 2505 Aqueduct building where a spring was removed?
A. Just removed and not replaced?
- Q. Yes. Correct.
A. No, not just removed. Usually if the windows are taken apart for a reason, to put it back together.
- Q. So you're not aware of any complaints regarding a window where the spring mechanisms was removed and not replaced?

A. No.

(Tr. p. 46, lines 5 through 18).

Q. How would you replace the spring mechanism?

A. You can buy them in supplies - - they have - - there's different supply houses in the Bronx, the managerial supply houses that will sell the springs on - - you know, for the things. They cost a few dollars and you replace them.

Q. How long does it take to replace a spring mechanism?

A. Someone who's qualified, half an hour, 20 minutes.

(Tr. p. 46, lines 24 through 25, p. 47, lines 2 through 10).

On a motion for summary judgment the burden of proof is on the movant to establish, by evidentiary proof in the form of affidavits, deposition testimony or otherwise, that no issues of material fact exist and judgment as a matter of law, should be granted in its favor. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Miller v. Staples Office Superstore East, Inc.*, 52 A.D.3d 309, 860 N.Y.S.2d 51 (1st Dept. 2008). An owner of property has a duty to maintain its premises so that they are reasonably safe. *Caicedo v. Ferreira*, 116 A.D.3d 553 (1st Dept. 2014). This duty extends to any hazardous condition which the owner actually caused or created or had actual or constructive notice thereof. *Id.* at 554; *Corprew v. City of New York*, 106 A.D.3d 524 (1st Dept. 2013).

Milbank asserts that it is entitled to summary judgment dismissing plaintiff's complaint on the following grounds: (1) plaintiff failed to identify the specific condition that caused the accident, or more specifically, that plaintiff could not establish the precise window within the Premises where the accident occurred; (2) Milbank lacked actual notice of the alleged condition that caused the accident; (3)

Milbank lacked constructive notice as the condition complained of was a latent defect; and (4) the subject window was not a substantial cause of plaintiff's condition that eventually required amputation.

Plaintiff's testimony that the accident occurred on the second floor of the Premises, at the window located in the middle of the hallway, across from the elevators, is a sufficient identification of the accident location.

The evidence submitted by Milbank fails to establish that they did not cause or create the condition, or did not have actual or constructive notice thereof. Radparvar's deposition testimony that he was unaware of a situation where a spring was removed from the Premises and not replaced is unsupported by documentary evidence. Radparvar testified that he oversaw a staff of approximately sixty craftsmen and handymen and kept "certain logs." These "certain logs" were not produced, nor were any repair or maintenance records pertaining to the windows within the Premises. Further, there was no affidavit or deposition testimony from the actual superintendent of the Premises. With respect to Milbank's claim of lack of actual or constructive notice of the alleged defective window, no evidence was submitted by Milbank that it ever inspected the subject window. With respect to Milbank's claim of that the condition complained of was a latent defect, Milbank submitted no evidence of what an adequate inspection would consist of (*i.e.*, the opening and closing of the subject window, etc.). Milbank's failure to make an initial showing that they did not cause or create the condition, or did not have actual or constructive notice thereof, requires the denial of the motion regardless of the sufficiency of the opposing papers. *Corprew v. City of New York, supra*.

Milbank claims that the window falling upon plaintiff's foot was not a substantial cause of plaintiff's condition that eventually required amputation. More specifically, Milbank asserts that plaintiff

had reported that he had picked off a pre-existing callous from his foot four weeks prior to his hospital visit, and plaintiff's foot ulcer resulted from plaintiff's self-debridement of his callous, which pre-existed his window accident. In support of this contention, Milbank cites the affirmed report of Dr.

Xenophontos. Dr. Xenophontos' report states, in relevant part, as follows:

"Grant has history of bilateral lower extremity peripheral neuropathy dating back to 2003. He developed what appears to be a neuropathic ulcer of the plantar aspect of the great right toe. Typically a callous or pressure wound forms at the plantar aspect of the toes or the feet because of pressure points developing due to the neuropathy.

When the callous was removed it appears that a wound developed. The wound subsequently became infected and was treated with antibiotics in the hospital and wound care. He was discharged on oral antibiotics and wound care.

There is no evidence of any significant trauma to the toe, such as fracture, which would have led to an infected plantar ulcer. A plantar wound, especially when untreated, can lead to cellulitis and osteomyelitis."

Plaintiff's medical expert, a physician and general/vascular surgeon, states in an affidavit that plaintiff had a history of a neuropathic foot dating back to 2003, which, although plaintiff was never diagnosed as diabetic, diminished his sensation and ability to feel pain, and would reasonably account for plaintiff's decreased awareness of the seriousness of his injury. The fact that plaintiff had peripheral neuropathy and was still able to feel worsening pain, resulting in his visit to the Montefiore Emergency Room on July 4, 2007, evidenced the seriousness of the trauma to plaintiff's foot from the falling window on June 29, 2007. There were no medical records documenting any ulcer on plaintiff's right toe or foot prior to the date of his accident on June 29, 2007. Notwithstanding the Montefiore record stating that plaintiff reported pulling off a callous, plaintiff denied this in his deposition testimony.

Dr. Xenophontos expressed a medical opinion that there was no evidence of significant trauma

to the right first toe, such as fracture, which would have led to an infected plantar ulcer. Plaintiff's medical expert disagrees with this assessment, stating with a reasonable degree of medical certainty that a fracture is not a condition precedent to trauma sufficient to cause an infected ulcer to a vulnerable patient such as plaintiff with a neuropathic foot. To the contrary, plaintiff's expert states that the crush of the toe and forefoot by the falling window was more than sufficient to create the open skin ulcer which was a portal for entry of bacteria and invasive infection and osteomyelitis (infection of the underlying bone).

Accordingly, issues of fact exist as to whether there was an ulcer on plaintiff's right first toe that pre-existed the window accident date and whether the trauma caused by the window falling on plaintiff's foot was sufficient to create the open skin ulcer which was a portal for entry of bacteria and invasive infection and osteomyelitis, precluding the granting of summary judgment.

Milbank's motion for summary judgment is denied in its entirety.

The branch of Montefiore's motion seeking summary judgment dismissing plaintiff's third cause of action sounding in lack of informed consent is granted, and the third cause of action contained in plaintiff's complaint is dismissed. With respect to the diagnosis and treatment of plaintiff prior to the amputation of his great right toe, there are no allegations by plaintiff that his injuries were due to an affirmative violation of his physical integrity. *Capobianco v. Marchese*, 125 A.D.3d 914 (2nd Dept. 2015). With respect to the amputation itself, plaintiff's medical records from Montefiore contain a consent form signed by plaintiff. Further, Dr. Porreca noted in plaintiff's chart that he discussed the risk of the amputation procedure and that a reasonable person in plaintiff's position would have undergone the procedure. Plaintiff failed to raise a triable issue with respect to lack of informed consent, as his

opposition papers do not address this cause of action or specifically oppose this branch of Montefiore's motion. *Capobianco v. Marchese, supra.*

Montefiore's motion also seeks dismissal of plaintiff's second cause of action sounding in medical malpractice. Plaintiff's medical expert opines that Montefiore departed from good and accepted practice by failing to diagnose osteomyelitis during plaintiff's July 4, 2007 hospitalization; by failing to perform a bone scan or MRI; by failing to perform the "probe to bone" test; by failing to place plaintiff on long term intravenous antibiotics; by failing to adequately surgically debride and culture the right great tow ulcer; by failing to adequately diagnose and treat the invasive infection; and by negligently discharging plaintiff from the hospital on July 7, 2007. Montefiore's medical experts assert that plaintiff received adequate IV antibiotics; wound care; debridement of the wound; monitoring; physical examinations; as well as an appropriate discharge. Montefiore's experts further assert that there was no evidence of deviation from standard care and that any need for the tests and treatment claimed to be necessary and appropriate by plaintiff's expert is unsupported by the hospital record and clinical diagnoses rendered. The Court finds that the conflicting opinions of the medical experts of plaintiff and Montefiore create issues of fact as to whether Montefiore deviated from good and medical practice, and that such issues of fact preclude the granting of summary judgment. Accordingly, the branch of Montefiore's motion seeking dismissal of plaintiff's second cause of action is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: 4/27/15



MARK FRIEDLANDER, J.S.C.