

English v New York City Hous. Auth.

2015 NY Slip Op 30995(U)

May 11, 2015

Supreme Court, Bronx County

Docket Number: 350562/10

Judge: Mark Friedlander

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

DAQUAN ENGLISH, an infant by his Mother and
Natural Guardian, CHRISTINA COHEN,

Plaintiffs,

-against

**MEMORANDUM
DECISION/ORDER**
Index No.: 350562/10

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

HON. MARK FRIEDLANDER

Defendant, New York City Housing Authority ("NYCHA"), moves for an order: (1) pursuant to CPLR§3126, striking plaintiffs' complaint for failure to provide discovery, and for willfully violating the Court's So-Ordered Stipulation requiring time-specified compliance, all to NYCHA's extreme prejudice; or (2) pursuant to CPLR§3126, precluding plaintiffs from offering any evidence with respect to the alleged condition of the staircase at the time of the alleged incident and precluding plaintiffs from offering any evidence as to the infant plaintiff's alleged damages; (3) directing the Clerk to enter judgment forthwith in NYCHA's favor; and in the event the previously requested relief is not granted; (4) pursuant to CPLR§3212(b), granting NYCHA summary judgment dismissing plaintiffs' complaint; (5) directing the Clerk to enter judgment forthwith in NYCHA's favor; and (6) pursuant to CPLR§3101(d), precluding plaintiffs from offering any purported expert testimony by Robert L. Schwartzberg, P.E. ("Schwartzberg"), at trial or in opposition to summary judgment because, *inter alia*, any such testimony would be based upon rank speculation without scientific basis relating to an alleged inspection conducted by Schwartzberg more than two and one half years after the alleged

incident. The branches of NYCHA's motion to dismiss plaintiffs' complaint for failure to provide discovery was resolved pursuant to stipulation that was So Ordered by Justice Laura G. Douglas on November 22, 2013. The branch of NYCHA's motion seeking summary judgment was respectfully referred to the undersigned, by Order of Justice Douglas. NYCHA's motion is decided as hereinafter indicated.

This is an action by infant plaintiff, Daquan English ("English"), to recover monetary damages for personal injuries allegedly sustained on February 27, 2010, at approximately 1:30 P.M., as a result of his slipping and falling while descending a staircase between the second and ground floor leading to the lobby of a NYCHA building located at 1479 Vyse Avenue, Bronx, New York. Co-plaintiff, Christina Cohen ("Cohen"), the mother and natural guardian of English, has asserted a derivative claim for loss of services and companionship of English. Plaintiffs' Notice of Claim, dated March 17, 2010, which has never been amended, asserts that English's accident occurred as a result of "the defective and slippery condition of the steps" because "the stairwell steps and risers were painted in a gloss slick finish and the previously applied friction strips on each step were removed without replacement, creating a dangerous and traplike condition."

The evidence adduced shows that plaintiff's fall was caused by a transient water condition of which defendant had no notice. Further, defendant has made a *prima facie* case of its entitlement to summary judgment through the affidavit of its expert, Mark Marpet, who states that the treads' coefficient of friction, either wet or dry, exceed the applicable standards for slip resistance. *Seleman v. Barnes & Noble, Inc.*, 114 A.D.3d 566 (1st Dept. 2014).

Section 27-375(h) of the 1968 New York City Building Code (The Administrative Code of the

City of New York, Section 27-375(h) [Building Code]), provides, with respect to interior stairs, that the “treads and landings shall be built of, or surfaced with non-skid materials.” However, the absence of slip resistant material and/or the use of high gloss enamel paint does not establish a violation of this section absent a showing that the surface lacked a minimum acceptable coefficient of friction and that the failure to use non-skid material or the use of such paint caused a deviation from the standard.

Gibbs v. 3220 Netherland Owners Corp., 99 A.D.3d 621 (1st Dept. 2012); *Saunders v. Morris Heights Mews Associates*, 69 A.D.3d 432 (1st Dept. 2010); *Jenkins v. New York City Housing Authority*, 11 A.D.3d 358 (1st Dept. 2004). In *Hotaling v. City of New York*, 55 A.D.3d 396 (1st Dept. 2008), the Court stated that:

“Before a claimed industry standard is accepted by a court as applicable to the facts of a case, the expert must do more than merely assert a personal belief that the claimed industry-wide standard existed at the time Nor are mere nonmandatory guidelines and recommendations sufficient (*Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]; *Capotosto v Roman Catholic Diocese of Rockville Ctr.*, 2 AD3d 384, 386 [2003]). The expert must offer concrete proof of the existence of the relied-upon standard as of the relevant time, such as ‘a published industry or professional standard or ... evidence that such a practice has been generally accepted in the relevant industry’ at the relevant time (*Jones v City of New York*, 32 AD3d 706, 707 [2006]).”

Plaintiff’s expert, Schwartzberg, asserts that Section 27-375(h) of the Building Code has been violated because good and accepted construction and engineering safety practice mandates that stairway treads, floors, walkway, etc., have a coefficient of friction of 0.50 or greater. His measurements of the coefficient of friction of the stairway treads, using a drag-sled tester, varied from 0.38 to 0.40 when dry. Schwartzberg cites, as the basis for the minimum coefficient of friction standard, as follows:

<u>AGENCY</u>	<u>RECOMMENDATIONS</u>
ADA (Americans with Disabilities Act) Flat Surface	0.60 Coefficient of friction

ADA Inclines surfaces	0.80 Coefficient of friction
OSHA (Occupational Safety And Health Act)	0.50 Coefficient of friction
NFPA (National Fire Protection Association)	0.68 Coefficient of friction
Department of Commerce (Threshold for safe passage on a floor)	0.50 Coefficient of friction

Schwartzberg's reference to the ADA is inapplicable, as its purpose is to address issues of discrimination and not safety, and it cannot be construed as setting a safety standard for stairs or walkways. *Lugo v. St. Nicholas Associates*, 18 A.D.3d 341 (1st Dept. 2005). Schwartzberg's reference to OSHA regulations is also inapplicable, as this agency's regulations are limited to the safety of employees. *Sarmiento v. C & E Assoc.*, 40 A.D.3d 524, 527 (1st Dept. 2007). Although Schwartzberg references the NFPA (0.68) and the Department of Commerce (0.50) as having recommendations pertaining to the coefficient of friction, he fails to cite the alleged specific applicable section thereof. Plaintiff's expert has failed to raise a triable issue of fact which would preclude the granting of summary judgment.

Accordingly, the branch of defendant's motion seeking summary judgment is granted and plaintiff's complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: 5/11/15



 MARK FRIEDLANDER, J.S.C.