Tao Niu v Sasha Realty LLC
2016 NY Slip Op 31182(U)
June 22, 2016
Supreme Court, New York County
Docket Number: 159128/2013
Judge: Joan M. Kenney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Tao Niu,

Plaintiff,

-against-

Sasha Realty LLC and Beach Lane Management, Inc.,

Defendants.

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DECISION AND ORDER
Index Number: 159128/2013
Motion Seq. No.: 004

KENNEY, JOAN M., J.

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

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-6
Opposition Affirmations, and Exhibits	7-15
Reply Affirmation	16-17

In this personal injury action, defendants, Sasha Realty LLC and Beach Lane Management, Inc., move for an Order, pursuant to CPLR 3212, dismissing the complaint.

Factual Background

On September 29, 2013, plaintiff Tao Niu sustained personal injuries after the stairs collapsed (the accident) at the apartment building located at 159 Second Avenue, New York, New York (the premises), owned and managed by defendants. Plaintiff, a non-tenant, was attending a party on the rooftop of the premises on the evening of the accident and upon re-entering the building from the rooftop exit, allegedly fell through three floors.

Plaintiff has no recollection of the specific events of the accident. Kirk Wolfman, defendant's building manager of the premises, testified that he inspected, by walking through the premises several times every week, for damage or items in need of repair, but that there had been no repairs or complaints regarding the staircase prior to the accident. Mr. Wolfman arrived at the

premises that evening after having been informed of the accident by the police. He testified that the top three stair landings had collapsed, and that the New York City Fire Department had installed temporary plywood landings to replace the three that collapsed. Mr. Wolfman further testified that he was cleaning the debris from the collapse until the next morning, at which point he informed the landlord, Mark Scharfman, that the stairs had collapsed.

Defendants offer the testimony of two expert engineers in support of their motion. Defendants' expert engineer, James Moore, submits an affidavit wherein he states that he inspected the premises on the same day of the accident, and that based on his inspection, there was no evidence of any defective condition involving the structure, maintenance or repair of any of the landings or steps damaged in the accident, and that there was no violation of the Administrative Code of the City of New York . Defendants' additional expert engineer, Rodney Blouch, submits an affidavit wherein he states that he inspected the premises on May 29, 2014, and that based on his inspection and review of the records in this case, he found no evidence of any defective condition on the steps or landings, and that they were adequately supported and maintained.

In opposition, plaintiff's expert engineer, Scott M. Silberman, submits an affidavit wherein he states that he inspected the premises on February 27, 2015 and May 29, 2014, and that based on his inspection and review of the records in the case, he opines that the manner in which the marble stairway landing at issue was constructed, without proper structural support beneath it, is contrary to the requirements of the applicable NYC Building Codes.

Arguments

Defendants argue plaintiff cannot meet his burden to prove negligence because: 1)

plaintiff does not know what caused him to fall and cannot identify a defective condition on the steps or landing; 2) the steps and landing were free of any defects; and 3) the defendants did not violate any applicable statutes in the ownership and maintenance of the steps and landing.

Plaintiff contends that there are triable issues of fact as to whether the defendants breached their duty to maintain the premises in a safe condition.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]). 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

NY2d 395, 144 NE2d 387, 165 NYS2d 49 [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. (*Rotube Extruders v Ceppos,* 46 NY2d 223, 385 NE2d 1068, 413 NYS2d 141 [1978]). Thus when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v Goodson,* 8 NY2d 8, 167 NE2d 328, 200 NYS2d 627 [1960]; *Sillman,* 3 NY2d at 404).

To demonstrate *prima facie* entitlement to judgment as a matter of law in a premises liability case, a defendant must establish that it did not create the condition that allegedly caused the fall or have actual or constructive notice of that condition (*see Gordon v American Museum of Natural History,* 67 NY2d 836, 837, 501 NYS2d 646, 492 NE2d 774). To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the defendant] to discover and remedy it" (*Id* at 837). "A defendant shows a lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous conditions did not exist when the area was last inspected or cleaned." (*Ross v Betty G. Reader Revocable Trust,* 86 AD3d 419, 421 [1st Dept 2011]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the staircase in question was last inspected prior to plaintiff's accident (*see Lorenzo v Plitt Theaters, Inc.,* 267 AD2d 54, 699 NYS2d 388 [1st Dept 1999]).

Here, defendants have failed to make a *prima facie* showing that they did not have constructive notice of the condition of the marble stair landings. Mr. Wolfman only testified about his general practice of visiting the building several times per week to inspect for general damages or items in need of repair, stating that he would walk through the building, and if he noticed any damage, "like a broken window or broken handrail," he would take a photograph and

send it to the main office. (See Plaintiff's Exhibit K, pp. 9-10). However, he did not testify when or if he ever specifically inspected the stairway landings, but rather only makes mention of inspecting the stairs' handrails. Additionally, the expert's affidavit submitted by plaintiff, which states that the construction of the marble stair landing was not in accordance with accepted practices, is sufficient to raise a triable issue of fact as to whether defendant should have inspected the staircase and landings and whether a reasonable inspection would have revealed the defective condition.

Next, defendants' argument that the complaint should be dismissed because plaintiff has no recollection of the accident or the cause of his fall must fail. The lack of witnesses to the accident and plaintiff's inability to recall how the accident happened does not, under certain circumstances, preclude plaintiff from asserting a cause of action sounding in negligence (see *Heer v No. Moore St. Developers, Inc,* 61 AD3d 617, 878 NYS2d 310 [1st Dept 2009]; see also, *Angamarca v New York City Partnership Hsg. Development Fund Co.,* 56 AD3d 264, 866 NYS2d 659, 660-661 [1st Dept 2008]). Here, plaintiff has submitted admissible *prima facie* evidence that his injuries were the direct result of his fall from the collapsing marble stair landing at the premises. It is undisputed that the stair landings in the building collapsed under him, corroborated by the testimony of Mr. Wolfman, the Buildings Department report, the FDNY incident report, and the ambulance report. There is simply no question as to the direct connection between plaintiff's fall, and his resulting injuries, and the stairs collapsing.

Contrary to defendants argument that Multiple Dwelling Law §52, entitled "Stairs," is inapplicable to this matter because it imposes no requirements regarding landings, MDL §52 defines them as a "flight or flights of steps together with any landings and parts of public halls through which it is necessary to pass in going from one level thereof to another." MDL §4(41).

Thus this statute does apply to the instant matter, and there is an issue of fact as to whether defendants violated the statute.

Defendants argue that they did not violate Multiple Dwelling Law §78 or Housing Maintenance Code §27-2005, which impose a "general duty of care" and requires that "[e]very multiple dwelling...and every part thereof...shall be kept in good repair" (*Aviles v Crystal management, Inc,* 253 AD2d 607, 677 NYS2d 330 [1st Dept 1998]; *Juarez by Juarez v Wavecreset Management Team Ltd.,* 88 NY2d 628, 672 NE2d 135 [1996]("This statute thus imposes upon a landlord "a duty to persons on its premises to maintain them in a reasonably safe condition")). In the present case, issues of fact exist as to whether the construction, maintenance, and overall condition of the stairway and landing was kept in good repair prior to its collapse, and thus MDL §78 and the Housing Maintenance Code are applicable.

Defendants also argue that Section C26-292.0(g)(3) of the Building Code of 1938 does not apply to the stairway because the stairway at issue cannot be considered "exit" stairs within the meaning of the regulation. The statute sets forth the requirements for support of landings in required stairways that serve as an "exit," which the Building Code defines as "a means of egress from the interior of a building to an open exterior space." Defendant cites to the decision of the First Department in *Gibbs v 3220 Netherlands Owners Corp.,* 99 AD3d 621 (1st Dept 2012), in which the steps leading from the first floor of a building to the lobby were not considered "exit" stairs with the meaning of the statute since the lobby places them too far away from the exit of the building. However, the stairway at issue directly leads to the rooftop of the building, which is not at all comparable to the set of stairs leading to a lobby leading to an exit in *Gibbs.* Plaintiff's expert's opinion, that the stairs are in violation of the code's requirements applicable to "exit" stairs, thus raises a triable issue of fact.

Generally, the theory of *res ipsa loquitur* is warranted only when the plaintiff can establish that: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to a voluntary action of contribution on the part of the plaintiff." (*Corcoran v Banner Super Market,* 19 NY2d 425, 430, 280 NYS2d 385, *mod on reminitur* 21 NY2d 793, 228 NYS2d 484, 235 NE2d 455 (quoting from Prosser, Torts §39 at 218).

Under ordinary circumstances stairways and landings do not "generally fall in the absence of negligence (e.g., improper installation, maintenance or repair), and the mere act of [stepping or jumping onto the landing] does not make the accident plaintiff's fault or put the [landing] under plaintiff's control" (*Pavon v Rudin,* 254 AD2d 143, 145 [1998]). However, with respect to the exclusive control element of the *res ipsa loquitur* doctrine, defendants have established that its control of the stairway and landing was not of "sufficient exclusivity to fairly rule out the change that the defect was caused by some agency other than [defendant's] negligence (*Dermatossian v New York City Tr. Auth.,* 67 NY2d 219, 228 [1986]). The stairway and landing at issue is regularly traversed by the building's tenants, building employees and visitors, and has been for decades. Accordingly, it is hereby

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

ORDERED, that the parties proceed to trial/mediation forthwith.

Dated: June 22, 2016

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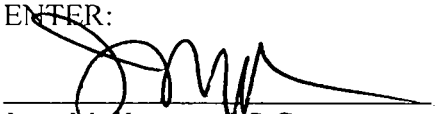

Joan M. Kenney, J.S.C.