

Johnson v 675 Coster St. Hous. Dev. Fund
2016 NY Slip Op 31356(U)
June 15, 2016
Supreme Court, Bronx County
Docket Number: 301361/12
Judge: Betty Owen Stinson
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NEW YORK SUPREME COURT - COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA 8

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OLIVER JOHNSON

Plaintiff(s),

Index No. 301361/12

-against-

DECISION AND ORDER

675 COSTER STREET HOUSING
DEVELOPMENT FUND and PWB
MANAGEMENT,

Present:
HON. BETTY OWEN STINSON

Defendant(s)

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STINSON, J.:

Defendants 675 Coster Street Housing Development Fund Corporation (HDFC) is comprised of tenant/owners of property located at 675 Coster Street, Bronx, New York and PWB Managment Corp., the management company hired by HDFC to manage the premises, move for summary judgment dismissing plaintiff's complaint on the grounds that the plaintiff Oliver Johnson has failed to identify any alleged defect in the premises that caused his fall. Plaintiff is the uncle of a tenant who lived in the premises in Apartment 3D. Mr. Johnson, a lawyer admitted to practice in the State of California arrived in New York City on January 5, 2011 to visit his nephew, Horace Lawrence Jordan for a couple of days. On Thursday, January 6, 2011 as plaintiff was descending the stairs between the third and second floors of defendants' building his right foot slipped out from under him as he was nearing the second floor. Mr. Johnson testified that he was looking forward and walking at a "regular pace". He was holding on to the handrail on the right hand side of the stairs. His left hand was in his pocket and he was wearing loafers with a

rubber or composite sole. The stairs go directly down from the third floor to the second floor without making any turns. The stairs are 36 inches in width as required by the building code. After his right foot slipped out from underneath him he testified he traveled forward in the air some four, five, six steps and landed mostly on his right leg and buttocks. He continued to hold on to the handrail to prevent further falling. His right leg was twisted outward toward the handrail and he felt immediate pain in his right ankle and right leg. He testified on February 15, 2013 at his deposition that he did not notice at that point what caused his fall.

No other person was with him, witnessed his fall, or approached him after his fall. He pulled himself up using the handrail then hopped down the “next set of steps”, out the building and into nephew’s car. Once with his nephew he got something to eat, Advil for the pain and swelling in his right ankle, and prune juice then returned to the nephew’s apartment where he was helped up the stairs by his nephew then went to bed. On Monday the 10th of January, he went to Lincoln Hospital where he was diagnosed with an ankle fracture which required surgery and the insertion of four pins, two of which were removed at a later date. Mr. Johnson remained at his nephew’s apartment until July 22, 2011 when he returned to California.

When asked at his deposition in 2013 if at any point he noticed what had caused his fall after the fact, he testified that on his first visit to the hospital after his surgery, about one month after the accident, he was going down the steps on his buttocks and “in and around the same area where I slipped where I fell—I looked at those steps and I could see they were concave because “I was going down the stairs as slowly as I can on my butt and I slipped and almost hurt my back.” “I said hey, that was the cause of the factor of my slipping.”

Defendant’s motion for summary judgment is granted insofar as the uncontroverted

evidence establishes that Johnson slipped and fell as a result of what he identified over a week after his fall as concave steps, a condition not created by defendant and about which it had no prior notice. While plaintiff tenders evidence establishing that the step and the staircase on which Johnson fell was defective in a number of ways, the evidence fails to establish that any of those defects proximately caused Johnson's accident.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY 2d 320, 324 [1986]; *Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish *prima facie* entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely pointing to gaps in plaintiff's proof (*Mondello v. DiStefano*, 16 AD 2d 634 [2nd Dep't. 2003]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY 2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v. Ceppos*, 46 NY 2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v. Goodson*, 8 NY 2d 8, 12 [1960]).

Under common law, a landowner has a duty to maintain his or her property in a reasonably

safe condition (*Basso v. Miller*, 40 NY 2d 233, 242 [1976]). Thus, the owner of a premises is required to exercise reasonable care in the maintenance of his property, taking into account all circumstances such as the likelihood of injuries to others, the seriousness of the injury, and the burden involved in avoiding the risk (*id.*). Accordingly, liability for a dangerous condition within a premises requires proof that either the owner created the dangerous condition or, that he had actual or constructive notice of a dangerous condition (*Piacquadio v. Recine Realty Corp.*, 84 NY 2d 967, 969 [1994]; *Bogart v. F.W. Woolworth Company*, 24 NY 2d 936, 937 [1969]; *Armstrong v. Ogden Allied Facility Managment Corporation*, 281 AD 2d 317, 318 [1st Dep't. 2001]; *Wasserstorm v. New York City Transit Authority*, 267 AD 2d 36, 37 [1st Dep't 1999]).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v. American Museum of Natural History*, 67 NY 2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* At 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v. Central Valley Realty Co.*, 300 AD 2d 422,423 [2002]. lv denied 99 NY 2d 509 [2008]; *McDuffie v. Fleet Fin. Group*, 269 AD 2d 575 [2000]).

Generally, on a motion for summary judgment a defendant establishes entitlement to

summary judgment when the evidence establishes *prima facie* the absence of notice, actual or constructive (*Hughes v. Carrols Corporation*, 248 AD 2d 923, 924 [3d Dep't. 1998]; *Edwards v. Wal-Mart Stores, Inc.*, 243 AD 2d 803 [3rd Dep't 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD 2d 790 [3d Dep't 1998]). Notably, in addition to the foregoing, a defendant seeking summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, must produce "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v. Betty G. Reader Revocable Trust*, 86 Ad 3d 419, 421 [1st Dep't 2011]; *Green v. Albemarle, LLC*, 966 [2d Dep't 2013]). If defendant meets his burden, it is then incumbent upon plaintiff to tender evidence indicating that defendant had actual or constructive notice (*Strowman v. Great Atlantic and Pacific Tea Company, Inc.*, 252 AD 2d 384, 385 [1st Dep't 1998]).

In support of this motion, defendant submits Johnson's deposition transcript, wherein he testified, in pertinent part, as follows:

Q: After you fell, did you notice at any point what caused you to fall?

A: No.

(p.33, l. 6-8)

Q: At any point did you notice what had caused you to fall?

A: You mean after the fact?

Q: At any time.

A: After the fact, yes.

Q: When after?

A: If was at my first visit to the hospital.

(p. 68, L 2-24).

A: I was negotiating the steps from my buttocks. And in and around the same area where I slipped on my buttocks and I said - - I looked at those steps and I could see they were concave because I was going down the stairs as slowly as I can on my butt and I slipped and almost hurt my back.

So I said - - I looked and those steps were concave. I said hey, that was the cause of the factor of my slipping. Those steps were in a state of disrepair. And that's when I really gave thought to the fact of what had happened.

Q: This is when you were heading back to the hospital for the first time after you were discharged?

A: The first time after the operation.

Q: So it was about a month after the accident occurred?

A: Yeah, right around there.

Q: This area that you said was about seven or eight steps, were these steps all in a row or were they staggered?

A: Let me say this, the first steps leading from the third floor to the second floor, they seemed to be a good condition. There seemed to be a different set of stairs. Then the next half a dozen of steps or more were in a state of disrepair in that they are concave. That was the area in which I slipped initially and slipped a second time as well.

Q: The portion of the steps that you said were concave, do you recall what the steps

beyond those looked like?

A: Well, I'm telling you the first three steps from the second landing going up are in good condition.

Q: Okay. As you were - -

A: They're different steps. They were installed sometime - - they looked - - they were all different steps than the rest of the stairway. The first three steps are in good condition. But after that they are in disrepair.

Acknowledging that all of these thoughts were after the fact, he testified about seven or eight steps were in the concave condition. The concave condition crosses the entire steps. When asked about where the seven or eight steps were on the entire staircase, he testified as follows:

The next half dozen steps or so were in a state of despair in that they were concave. That was the area in which I slipped initially and slipped a second time as well.¹ Mr. Johnson testified that the first steps leading from the third floor, to the second floor seemed to be in good condition, as if they were installed at a different time. Then, in response to a clarifying question he stated all the steps were in disrepair except the three at the bottom closest to the second floor. He had just previously testified that the first three steps leading from the second floor going up are in good condition. Which is it? The top three steps are in good repair or is it the bottom three or is it that all are except those that could possibly be the ones he slipped on?

In any event, the photographs annexed to Scott E. Derector, P.E.'s affidavit do not bear out the plaintiff's testimony nor do the July 25, 2013 photograph annexed to Stanley Fein's affidavit

¹The second slipping allegedly occurred when he was descending the stairs on his buttocks.

taken closer in time to the accident and after his site inspection on July 17, 2011. Mr. Johnson attempts to bolster his deposition transcript by submitting an affidavit which essentially mirrors the words and description of the stairs as described by his expert Stanley Fein. He attempts to add additional defects never before mentioned and is merely tailoring his version of the facts to meet the defects alleged but not shown by Mr. Fein's affidavit, report or photographs.

The affidavit of Stanley Fein submitted by plaintiff who after a site inspection rendered an opinion that "the steps were in extremely poor and deteriorated condition." Specifically, the steps did not contain constant riser heights; the front bullnosed section of the steps were faded and the riser height was reduced from 7 ½ to 7 inches creating, in his opinion, an imbalance for individuals traveling the steps and would create an unsafe tripping hazard. Plaintiff did not say he "tripped". He found the steps were not maintained in a safe manner because the front bullnose portions of the steps were extremely worn to an angle of approximately 45 degrees. He speaks often about defects in the risers. According to his photos, the riser is the portion of the step that is at right angles to the portion of the stair that you step on to go up and down. Stanley Fein's affidavit and report fail to raise an issue of fact sufficient to preclude summary judgment. Just because he noted that the risers and treads varied in height and that created an unsafe condition does not constitute evidence that the defendants had prior notice. All the other alleged defects mentioned are irrelevant since it is clear the accident was caused by "the concave condition noted by plaintiff well after the fact." If there is a violation of the Multiple Dwelling Law, which has not been established, there must also be proof that the violation caused the accident alleged. Mr. Johnson did not attribute his fall to any other defects which might have been afflicting the stairs-at least as determined by Stanley Fein. Accordingly, these defects were not a proximate cause of

plaintiff's accident.

It is hereby

ORDERED that plaintiff's complaint be dismissed with prejudice. It is further

ORDERED that defendant serve a copy of this decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes the decision and Order of the court.

June 15, 2016
Bronx, New York



BETTY OWEN STINSON, J.S.C.