

Del Marte v Leka Realty LLC
2016 NY Slip Op 31363(U)
June 14, 2016
Supreme Court, Bronx County
Docket Number: 303840/13
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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YOLANDA MERCEDES POLANCO DEL MARTE AND BLAS
ANTONIO MARTES,

DECISION AND ORDER

Plaintiff(s), Index No: 303840/13

- against -

LEKA REALTY LLC,

Defendant(s).

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Stinson, J.

In this action for premises liability, defendant moves seeking an order granting it summary judgment against plaintiffs thereby dismissing the complaint. Defendant contends, *inter alia*, that it neither caused nor created the condition alleged to have caused YOLANDA MERCEDES POLANCO DEL MARTE's (Mercedes) accident - a wobbly/loose step - and had no prior notice of the same. Plaintiffs oppose this motion contending that questions of fact preclude summary judgment.

For the reasons that follow hereinafter, defendant's motion is granted.

The instant action is for alleged personal injuries allegedly sustained as a result of the negligent maintenance of a premises. The complaint alleges that on May 6, 2013, Mercedes slipped and fell while traversing the interior steps located at 2515 Davidson Avenue, Bronx, NY (2515). The complaint alleges that the step was

defective and covered with liquid and debris. Plaintiffs allege that defendant was negligent in the ownership and maintenance of the aforementioned steps, said negligence causing Mercedes' accident and resulting injuries. Plaintiff BLAS ANTONIO MARTES (Martes), as Mercedes' husband, asserts a derivative loss of consortium claim.

Defendant's motion is granted insofar as the uncontroverted evidence establishes that Mercedes tripped and fell as a result of a wobbly step, a condition not created by defendant and about which it had no prior notice. While plaintiffs tender evidence establishing that the step and the staircase on which Mercedes fell was defective in a number of ways, the evidence fails to establish that any of those defects proximately caused Mercedes' 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 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 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 by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 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 NY2d 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 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Under the common law, a landowner is duty bound to maintain his or her property in a reasonably safe condition (*Basso v Miller*, 40 NY2d 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 the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden*

Allied Facility Management Corporation, 281 AD2d 317, 318 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 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 NY2d 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 AD2d 422, 423 [2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575, 575 [2000]).

Generally, on a motion for summary judgment a defendant establishes *prima facie* entitlement to summary judgment when the evidence establishes the absence of notice, actual or constructive (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998];

Edwards v Wal-Mart Stores, Inc., 243 AD2d 803, 803 [3d Dept 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD2d 790, 790 [3d Dept 1998]). Notably, 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 AD3d 419, 421 [1st Dept 2011]; *Green v Albemarle, LLC*, 966, 966 [2d Dept 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 AD2d 384, 385 [1st Dept 1998]).

In support of this motion defendant submits Mercedes' deposition transcript, wherein she testified, in pertinent part, as follows. On May 6, 2013, while within 2515, Mercedes tripped and fell within the stairs located therein. Mercedes was employed at a daycare center located within 2515 in apartment 3B. On the date of the instant accident, Mercedes arrived at 2515 and decided to forego the elevator, choosing to use the stairs instead. At approximately 9:45AM, as she neared the third floor landing, she tripped and fell when the third step from the top moved as she stepped onto it. When asked what caused her fall, Mercedes

testified that "[t]he stairwell was a little - was a bit defective. It kind of wasn't steady." When asked to clarify, Mercedes indicated that "[i]t [the step] wasn't firm, it would like shake." She further noted that she fell "[b]ecause when I went up the - that the step moved." Mercedes indicated that the staircase which she was ascending had railings on both sides and that immediately prior to her fall, she was holding on to the railing on her right. In the two months that she had been employed within 2515, Mercedes had only used the stairs two or three times. When asked whether she had taken note of any prior problems with the stairs, she ultimately testified that she had not. Specifically, when asked "[a]nytime before your accident, did you notice any problems with the stairwell?," Mercedes responded that she had not.

Defendant also submits Gjergji Cotaj's (Cotaj) deposition transcript, wherein he testified, in pertinent part, as follows. Cotaj was and is employed as a property manager for the defendant. His duties and responsibilities include the collection of rents for the properties defendant manages and ensuring the any necessary repairs are performed. Defendant acquired 2515 in 2009. 2515 is a six story residential building with eight apartments per floor and one apartment in the basement. Defendant employed Carlos Soto (Soto) as 2515's superintendent and Soto lived within 2515 in the basement. It was Soto's job to keep the stairs within 2515 clean and he had the discretion to complete this task as he saw fit. In

addition to an elevator, 2515 had one set of stairs to provide access to each floor. There were two sets of stairs and a landing in between each floor and windows at each landing located in between the floors. There was a railing along all the stairs on the right hand side. Prior to Mercedes' accident, and since acquiring 2515 in 2009, defendant made no repairs to the stairs, received no complaints regarding the stairs, and Cotaj never had occasion to complain to Soto about the condition of the stairs.

Defendant submits Soto's deposition transcript, wherein he testified, in pertinent part, as follows. Soto was employed by defendant as the superintendent for 2515. He had been so-employed since 2010, lived in the basement of 2515, and was tasked with keeping the building clean. With respect to the staircase within 2515, Soto testified that he swept the same everyday and had swept them at 7AM on May 6, 2013. There was a sheet near his office in the basement where tenants would lodge complaints regarding conditions in the building. Prior to Mercedes' accident he had never received any complaints regarding the staircase within 2515, had never made repairs to the steps therein, and had never observed any defects related to the stairs. Soto testified that on the date of Mercedes' accident, he saw her come into the building and ascend the steps. Thereafter, he heard a noise and upon reporting to the second floor found Mercedes on the floor. He described the lighting conditions at the time as bright and indicated that there

were windows at every landing along the staircase.

Based on the foregoing, defendant establishes *prima facie* entitlement to summary judgment. Here, both Cotaj and Soto testified that prior to the instant accident, they had received no complaints regarding any defects to the steps within 2515. Further, Soto testified that he cleaned the steps at 7AM on the date of plaintiff's accident and did not notice and defects thereon. Thus, defendant's establish the absence of notice. Inasmuch as 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 (*Anderson* at 423; *McDuffie* at 575), here, while Mercedes testified that she slipped as a result of a loose step within 2515, because she testified that she had never noted that condition prior to her accident, defendant cannot be charged with constructive notice of that condition. Lastly, because Cotaj and Soto testified that defendant made no repairs to the stairs within 2515, the evidence also establishes that they did not create the dangerous condition alleged; a prerequisite to liability (*Bogart* at 937; *Allen*, 529; *Kraemer* at 590).

Nothing submitted by plaintiffs raises material questions of fact precluding summary judgment. Once defendant meets his burden of establishing the absence of notice and that it did not create the defective condition alleged, it is then incumbent on plaintiff

to tender evidence indicating that defendant had actual or constructive notice of the defect alleged (*Strowman* at 385). Notably, plaintiffs' opposition is replete with alleged factual disputes which have no bearing on the relevant issue, namely whether defendant created the condition alleged or had prior notice of the same. For example, plaintiffs give considerable import to the fact that non-party witness Armida Menaldo (Menaldo) testified that the Soto had a helper named Rene who was present at 2515 on the date of Mercedes' accident and that Rene was tasked with maintenance of the instant steps. While it is true that both Soto and Cotaj denied that Rene was ever employed by defendant, thereby creating an issue of fact, it is hard to imagine how this issue is material. At best alluding to what Rene might say if he were deposed is merely impermissible surmise, a mere conclusion, an expression of hope or an unsubstantiated allegation or assertion; all of which are insufficient to defeat summary judgement (*Zuckerman* at 562). Similarly, plaintiffs also reference Menaldo's testimony that making complaints to defendant about defects in the building had previously proven fruitless as if this is tantamount to actual notice. It is not. Nothing in Menaldo's testimony gives establishes prior notice of a defect on the steps herein.

Plaintiffs also submit an affidavit from William Marletta (Marletta), a safety consultant, who upon a review of records and a post-accident inspection of the situs of this accident, renders

an opinion. Marletta concludes that upon his inspection he noted that the step on which Mercedes fell was cracked, damaged, loose and unstable, such that it constituted a dangerous condition. Marletta further concludes that the step in question was improperly repaired inasmuch as he noted rubber adhesive thereon. Marletta then opines that the riser heights on the instant steps were inadequate, that the light at this location was insufficient, and that the railing thereat was also inadequate. Marletta notes that the foregoing conditions violate the Multiple Dwelling Law.

Marletta's affidavit and the opinions therein fail to raise an issue of fact sufficient to preclude summary judgment because while he noted a loose step, he noted the same on June 11, 2013, well after Mercedes' accident. Thus, the foregoing does not constitute evidence that defendant had prior notice. To the extent that Marletta finds a legion of other purported defects on the stairs, such findings are irrelevant since it is clear that the instant accident was solely caused by a loose step. Clearly, to the extent that Marletta opines that many of the defects he found violate the Multiple Dwelling Law, plaintiffs seek to establish that defendant is negligent *per se*. While a violation of the Multiple Dwelling Law does give rise to negligence *per se* (*Santana v Seagrave Fire Apparatus Corp.*, 305 AD2d 395, 399 [2d Dept 2003]), for purposes of liability there must also be proof that such negligence proximately caused the accident alleged (*id.* at 399). Here, Mercedes never

attributed her fall to any other defects which might have been afflicting the stairs - at least as determined by Marletta. Accordingly, those defects were not the proximate cause of the instant accident (see *Hyman v Queens County Bancorp, Inc.*, 307 AD2d 984, 986-87 [2d Dept 2003], *affd*, 3 NY3d 743 [2004] ["Furthermore, even if a building code violation had been established, we do not agree with the dissent's view that an issue of fact exists as to whether the lack of a second handrail was a proximate cause of the injured plaintiff's fall. At his deposition, the injured plaintiff testified that he was standing near the center of the stairway when he slipped, and that when his body turned around, he reached for the existing handrail which was now on his right, but was unable to catch it sufficiently to stop his fall. Under these circumstances, it would be sheer speculation for a jury to find that the presence of a second handrail would have prevented the injured plaintiff from falling."]; *cf. Penge v Bd. of Educ. of City of New York*, 10 AD3d 251, 251-52 [1st Dept 2004] ["Contrary to the court's reasoning and to defendant's contention that plaintiff offered no grounds to support her theory that she would have recovered her footing had there been an adult handrail, plaintiff's testimony that after she reached out for the missing banister she managed to grab onto the lower child handrail precludes a finding as a matter of law that she would not have been within reach of an adult handrail. Defendant's argument that the missing handrail on the

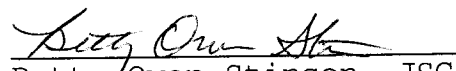
right side of the staircase did not proximately cause plaintiff's fall since plaintiff chose not to use the available left-side handrail is more appropriately directed to the issue of comparative negligence. Moreover, the cases advanced by defendant are distinguishable from the instant case."]). In sum, any defect with the riser height on the steps, the inadequacy of the lighting thereon, or the inadequacy of the railing - the defects on which plaintiffs premise liability - are irrelevant must be disregarded, and do not raise an issue of fact sufficient to preclude summary judgment. It is hereby

ORDERED that plaintiffs' 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 this Court's decision and Order.

Dated : June ¹⁴~~10~~, 2016
Bronx, New York


Betty Owen Stinson, JSC