Morchyk v Acadia 3780-3858 Nostrand Ave., LLC
2016 NY Slip Op 31446(U)
July 22, 2016
Supreme Court, Kings County
Docket Number: 504496/13
Judge: Wavny Toussaint
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of July, 2016.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

-----------------------------------X

TATYANA MORCHYK
Plaintiff,

- against -

Index No. 504496/13

ACADIA 3780-3858 NOSTRAND AVENUE, LLC,

Defendant.

-----------------------------------X

The following papers numbered 1-4 to read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, the defendant Acadia 3780-3858 Nostrand Avenue, LLC, moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor dismissing the complaint of the plaintiff Tatyana Morchyk and any and all cross-claims.

Background

This is an action for personal injuries resulting from an incident which took place on June 18, 2013, when the plaintiff Morchyk Tatyana fell on a staircase abutting the premises known as 3820 Nostrand Avenue in Brooklyn, New York. The premises were owned and maintained by the defendant, Acadia 3780-3858 Nostrand Avenue, LLC. During her deposition, the plaintiff testified that she worked as a medical billing specialist for BillMed Management, LLC, which had an office located at 3820 Nostrand Avenue. BillMed's office was located on the second floor of the two-story building. Plaintiff had been employed by BillMed for approximately six years. She testified that she typically entered the building from the Nostrand Avenue entrance where there was a small lobby with an elevator and a staircase to the second floor. Plaintiff stated that she usually alternated using the elevator and the staircase in the morning when she arrived at work, but that she always used the staircase to go down to the street level whenever she left work for the evening.

Plaintiff described the staircase as being carpeted and having only one handrail located on the right side of the staircase as you walked up. Just before the accident occurred, the plaintiff was on her 10 minute break and headed down the staircase in order to go outside of the building. As plaintiff walked down the stairs, she fell forward as she reached the third or fourth step and then fell down several steps, but not all the way down to the bottom stair. Plaintiff testified that she did not know why she fell down the stairs. She also stated that she did not remember seeing anything out of the ordinary on the staircase. Although there

was a handrail to left of the plaintiff as she was walking down, she claimed that she couldn't hold it because someone was coming up the staircase on her left side where the handrail was located. Plaintiff additionally testified that nobody saw her fall, but that a few co-workers, who were coming inside after their break, saw her lying on the stairs afterwards. Plaintiff remained on the stairs for about 30 minutes, until her husband arrived and took her home in his car.

Discussion

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact, or where such issue is even arguable (*Kolivas v Kirchoff*, 14 AD3d 493[2d Dept 2005]). Where one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter *(Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Furthermore, on a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party (*Escobar v Velez,* 116 AD3d 735 (2d Dept. 2014)*, citing Bravo v Vargas*, 113 AD3d 579; 582 [2d Dept. 2014]).

In support of its motion, the defendant argues that it is entitled to summary judgment as a matter of law because the plaintiff cannot identify the cause of her fall without resorting

to speculation (*Califano v Maple Lanes*, 91 AD3d 896, 897 [2d Dept. 2012]; *McFadden v 726 Liberty Corp.,* 89 AD3d 1067 [2011]; *Aguilar v Anthony,* 80 AD3d 544, 545 [2d Dept. 2011]). The defendant has submitted a transcript of the plaintiff's deposition testimony, wherein she specifically stated that she did not know why she fell, and that she did not observe anything out of the ordinary that would have caused her to fall. Further, the defendant maintains, through the plaintiff's deposition testimony and its own deposition testimony, that it did not create or have actual or constructive notice of any alleged defect on the subject staircase (*Sama v Sama*, 92 AD3d 862 [2d Dept. 2012]).

Defendant relies on the deposition testimony of Todd McGaughey, its property manager for the premises. Mr. McGaughey testified that, at the time of the incident, he had a worker (Mr. Santana) present at the building on a daily basis, who was responsible for cleaning and vacuuming the rugs and common areas, which included vacuuming the carpet on the subject staircase. Mr. McGaughey further testified that he never received any complaints regarding the stairs or the lighting in the area, and he was not aware of any prior accidents occurring on the staircase.

In opposition, the plaintiff initially argues that the defendant's motion must be denied as they did not submit evidence in admissible form. In this regard, plaintiff argues that the defendant submitted an unsigned deposition transcript of the plaintiff. On April 15, 2015, the plaintiff signed her deposition transcript including the errata sheet with changes made. The errata sheet made a correction to page 49 of plaintiff's transcript (Lines 11-12), which stated:

> "I am not sure why I fell down, but I tried to reach out for a handrail and there was none available to my right. The left side handrail was blocked by the other person ." (Prakhin Affidavit, Exhibit A).

Plaintiff's counsel claims that he forwarded the executed copy of plaintiff's transcript to the defendant on or about April 17, 2015, but that the defendant's counsel knowingly made the within motion using an unsigned version of plaintiff's deposition transcript prior to the expiration of the plaintiff's time to review and sign same.

As to the merits, plaintiff argues that an issue of fact exists as to whether the defendant was negligent in failing to equip the subject staircase with a handrail on both sides and whether the lack of a handrail on both sides of the stairway was a proximate cause of her accident.

Plaintiff additionally argues that the defendant was negligent per se in that the failure to have handrails on both sides of the staircase was in violation of either section C26-292 of the 1938 Building Code or the 1968 Building Code section 27-375(f), whichever is applicable herein. Section C26-292 of the 1938 Building Code states, in part, that required exit stairs shall have walls or well secured balustrades or guards on both sides with hand-rails on both sides. New York City Administrative Code § 27-375(f) provides that:

> Interior stairs shall comply with the following requirements: . . . Guards and handrails. Stairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only. Handrails shall provide a finger clearance of one and one-half inches, and shall project not more than three and one-half inches into the required stair width.

In support of this contention, the plaintiff refers to the deposition testimony of Mr. McGaughey, wherein he described the staircase as having only one handrail, which is the condition it was in when defendant purchased the building. In addition, Mr. McGaughey *estimated* that the subject staircase was four feet wide (Bender Affirmation, Exhibit D, at 24). Based upon Mr. McGaughey's testimony, plaintiff argues that the staircase was over 44 inches wide and, therefore, required to have guardrails on each side pursuant to the NYC Building Code (*see* Administrative Code of City of NY § 27-375 [f]), or section C26-292 of the 1938 Building Code).

As an initial matter, the court finds that the deposition transcript of the plaintiff annexed to the defendant's motion is admissible. Although unsigned, the plaintiff's deposition transcript was certified by the stenographer, and the plaintiff has not raised any challenges to its accuracy or any of the excerpts referenced by the defendant in support of its motion. Furthermore, the statements set forth on the errata sheet were consistent with the same testimony the plaintiff gave on page 46 of her deposition transcript. Thus, the transcript submitted by the defendant qualifies as admissible evidence for purposes of the defendant's motion for summary judgment (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]; *Zalot v Zieba*, 81 AD3d 935, 936 [2d Dept 2011]).

Based upon the foregoing, the court finds that the defendant has sustained its initial burden of demonstrating that the plaintiff cannot identify the cause of her fall without engaging in speculation (*Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013];

Kudrina v 82-04 Lefferts Tenants Corp., 110 AD3d 963 [2d Dept 2013]). A plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*O'Connor v. Metro Mgmt. Dev., Inc.*, 130 AD3d 698, 699-700 [2d Dept 2015]; *Rivera v J. Nazzaro Partnership,* L.P., 122 AD3d 826, 827 [2d Dept 2014]). Here, the plaintiff testified at her deposition that she did not know why she fell, did not notice anything out of the ordinary on the staircase and could not recall what the lighting was like in the stairwell The burden thus shifted to the plaintiff to demonstrate the existence of a triable issue of fact to preclude granting the defendant's motion (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Although the plaintiff argues in opposition that the failure to install a second handrail violated the building codes, she has offered no proof from which it could be inferred that the provisions upon which she relies were in effect when the building was constructed. In fact, the record is devoid of any evidence as to the date the building was constructed, or when the defendant purchased the premises. Plaintiff's counsel even admits that "it is not clear how old the subject building is" (Prakhin Affidavit, at ¶ 33). Furthermore, plaintiff only relies upon speculation as to the width of the subject staircase. Mr. McGaughey's testimony that the staircase was four feet wide was an estimate at best since it was not based upon his actual measurement. In fact, the plaintiff submitted no evidence that the staircase had actually been measured by anyone, and she presented no expert testimony regarding same (*Vazquez v JRG Realty Corp.,* 81 AD3d 555 [1 Dept 2011]). Under these circumstances, the court finds that

the plaintiff has not come forward with any competent evidence to establish that the failure to provide a second handrail violated the City building codes (*Beecher v Northern Men's Sauna*, 272 AD2d 281 [2d Dept 2000])

Moreover, even if a building code violation had been established, the court does not find that an issue of fact exists as to whether the lack of a second handrail was a proximate cause of the plaintiff's fall. At her deposition, the plaintiff testified that she did not know why she fell. On this record, it would be sheer speculation to conclude that, the presence of a second handrail would have prevented the plaintiff from falling (*Bitterman v Grotyohann*, 295 AD2d 383 [2d Dept 2002]). As the plaintiff has failed to raise a triable issue of fact, defendant's motion for summary judgment dismissing the complaint is granted.

This constitutes the decision, order and judgment of the court.

ENTER

J. S. C.

HON. WAVNY TOUSSAINT
J. S. C.

Nancy T. Sunshine
Clerk

2016 JUL 27 PM 2:01
FILED
KINGS COUNTY CLERK