Louree v New York City Hous. Auth.
2016 NY Slip Op 31690(U)
August 2, 2016
Supreme Court, New York County
Docket Number: 151840/12
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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NYSHEMA LOUREE,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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Index No. 151840/12
Motion Sequence: 002

DECISION/ORDER
ARLENE P. BLUTH, JSC

The motion by Defendant NYCHA for summary judgment dismissing plaintiff's complaint is granted. The plaintiff's cross-motion for leave to amend the notice of claim is denied.

Plaintiff lives on the ninth floor in a NYCHA building at 230 East 115th Street. In her notice of claim, she states that on October 29, 2011 at approximately 8:30 p.m., she slipped and fell due to a slippery substance on the floor near the garbage chute in the hallway on the ninth floor. She states that the hazardous condition was due to stuff "dripping from tenants' garbage bags either as they were carried, dragged or otherwise transported to the incinerator. The hazard also arose from bags being ripped when they were forced into the incinerator chute which is too small for its intended purpose, and allowed to accumulate in the area around the incinerator which is in direct proximity" to plaintiff's apartment.

Therefore, plaintiff's November 10, 2011 notice of claim faults NYCHA for failing to clean up after other tenants who either brought dripping garbage to the chute or broke bags by

shoving them into the chute, causing drips to fall near the chute. Alternatively, plaintiff faults NYCHA for having chutes that were too small or improperly maintained.

Plaintiff's Cross Motion to Amend Notice of Claim

The Court first addresses the 2016 cross motion. Now, more than four years after putting NYCHA on notice of the alleged problems with clean up and maintenance/size of the chute, plaintiff moves to amend the notice of claim to add a claim of inadequate lighting. As the statute of limitations has long expired in this 2011 accident, the Court is without authority to grant the cross-motion to add a new theory of liability (*Pierson v City of New York,* 56 NY2d 950, 453 NYS2d 615 [2004]) and inadequate lighting constitutes a new theory of liability (*see Melendez v NYCHA,* 294 AD2d 243, 741 NYS2d 866 (Mem) [1st Dept 2002]; *White v NYCHA*, 288 AD2d 150, 734 NYS2d 11 [1st Dept 2001]).

Therefore, plaintiff's cross-motion, brought after the statute of limitations expired, to add a theory of liability not included in the notice of claim, is denied.

Defendant's motion for summary judgment

NYCHA moves to dismiss the claims against it based upon lack of notice as to the garbage condition and the allegedly defective chute.

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" *(Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima

facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied *(Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Parties' contentions

With respect to the chute, NYCHA asserts that the chutes were inspected monthly and the most recent inspection of the 9th floor chute occurred on October 18, 2011, eleven days before plaintiff's fall, and the door was functioning properly at that time (*see* affidavit of Victoria Aliheukwu, exh. I to moving papers and the exhibit thereto).

With respect to the alleged slippery condition on the floor, defendant asserts that this transient condition was not present when the caretaker made his rounds between 8-9 a.m. that day and again between 12-1 p.m. that day. Defendant also asserts that it was never notified of the specific spill on the ninth floor at any time on October 29, 2011, the day of the accident.

Therefore, defendant met its burden on summary judgment and the burden shifted to plaintiff to raise an issue of fact requiring a trial to resolve.

There is no claim or evidence that NYCHA had actual notice of the spill. Plaintiff did not report, and plaintiff did not submit an affidavit from any person stating he/she reported, that specific slippery condition on October 29, 2011 to NYCHA. Plaintiff did not claim to see, nor did she submit an affidavit from any person stating he/she saw, that slippery condition before 1 p.m. that day (which would have contradicted the caretaker's affidavit). Therefore, nowhere in plaintiff's opposition does she contradict defendant's showing that if there was a spill, it happened after 1p.m. that day, and that no one notified defendant of any spill that day.

With respect to the chute door, the notice of claim (cited above) alleged that the opening was too small for its intended purpose and that NYCHA failed to properly maintain the chute. In opposition to the motion, plaintiff abandons that part of her claim set forth in her notice of claim – that the chute was too small for its purpose – when she states that after her accident, the door was replaced and "the condition has not occurred since then" (plaintiff's affidavit in opp ¶ 3). As the size of the chute has not changed and the condition has not recurred, it is highly unlikely that the problem was the size of the chute.

At the 50H hearing, plaintiff testified that when she fell she looked up and saw parts of a garbage bag were hanging out of the bottom two corners of the chute, as if someone tried to shove an oversized bag into the chute, and left it there, partially hanging out and dripping with the chute door still open; she testified that at the time of her accident, "you could never close the chute fully" (50H transcript, pages 23-26). In her deposition, however, plaintiff testified that she did not see any trash or trash bag coming out of the chute because it was dark, but she could see

that the chute door was open about five or six inches but could not see what was keeping it open (plaintiff's deposition, pages 38-39); notably, she did not at that time say that the door did not fully close and maybe nothing was shoved in.

And so until her opposition to this motion, plaintiff blamed the spill on dripping garbage from other tenants. At her 50H hearing, plaintiff testified a garbage bag was shoved into the chute and left there to drip, and that the chute door did not close fully. At her deposition, she testified she did not see any garbage bag whatsoever, that she saw the chute was open but could not see what was holding it open.

And now, in opposition to the motion, she blames everything on the chute door, ignoring her prior testimony that someone threw a garbage bag in the chute and didn't bother to make sure it descended, or that she didn't see what was holding the door to the chute open. Now, in her affidavit in support of her cross motion/opposition to NYCHA's motion, plaintiff swears to still another story - her most recent claim, obviously in response to the chute inspector's moving affidavit and monthly report attached thereto, is that it was a long standing problem with an improperly working chute door that led to her accident. She says the chute door did not open and close properly for four years (but she never complained to management and has no proof that anyone ever complained to management about the chute door). Now she claims that the bad door, and not people shoving oversized bags into the chute and walking away from broken, dripping garbage, caused garbage to leak out of bags and drip to the floor.

Analysis

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" *(Rodriguez v 705–7 E. 179th St. Hous. Dev. Fund Corp.*, 79 A.D.3d 518, 519, 913 N.Y.S.2d 189 [1st Dept 2010]). Here, NYCHA demonstrated that it did not create or have actual notice of the slippery spot on the floor. Indeed, plaintiff does not even claim that NYCHA had actual notice.

Here, plaintiff's claim hinges on constructive notice, both of the spill and of the condition of the chute door. A defendant may be charged with constructive notice when a dangerous condition is "ongoing ... [and] routinely left unaddressed" (*Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 A.D.2d 107, 758 N.Y.S.2d 650 [1st Dept 2003]). "[T]o 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 defendant's employees to discover and remedy it" *(Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 NYS2d 646 [1986]).

Constructive notice and the spill

Proof of a defendant's general awareness of some dangerous condition is legally insufficient to constitute constructive notice of the particular condition that allegedly caused a plaintiff to fall (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493, 646 N.E.2d 795 [1994]; *Gonzalez v Jenel Mgt. Corp.*, 11 A.D.3d 656, 784 NYS2d 135 [2d Dept 2004]; *Kershner v Pathmark Stores*, 280 AD2d 583, 720 NYS2d 552 [2d Dept 2001]). Even if the problem was recurring, the record shows that NYCHA addressed it by inspecting hallways

and cleaning up garbage and spills twice a day, Thus NYCHA has demonstrated lack of constructive notice of the spill and is entitled to summary judgment on this point (*see DeJesus v NYCHA*, 53 A.D.3d 410, 861 NYS2d 31 [1st Dept 2008] *affd* 11 NY3d 889 [2008]).

Besides, plaintiff has submitted no proof whatsoever as to how long that slippery condition existed near the garbage chute on the date of the accident. It could have been there for seven hours, immediately after NYCHA's second inspection at 1 p.m., or it could have been there for seven minutes, right before plaintiff got off the elevator. How long the condition existed is pure speculation, and speculation does not defeat summary judgment.

Constructive notice of the chute door; feigned issue of fact

In the moving papers, NYCHA demonstrated that it conducted monthly inspections of the chute door and the door was found to be in working order at the inspection conducted only eleven days before the accident. And while plaintiff testified that the door did not close all the way, she has not presented any evidence of how far it did close. Certainly, it could still be in working order and pass the inspection eleven days before the accident even if it did not close as tightly as the day it was installed brand-new. There is a big difference between something closing with a half-inch gap and something closing with a ten inch gap. Plaintiff does not submit an expert report, pictures or any other proof as to what she concludes is an improperly closing door. Therefore, the court finds no issue of fact on this point; it is perfectly possible that the door did not close all the way but that it still passed inspection because it was in working order.[1]

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[1]Although plaintiff claims that a week before the accident she told someone about the door, the same analysis applies: without proof of how far the gap was, the mere failure to close all the way does not equate to an improperly closing door or a dangerous condition.

The Court must address the changes to plaintiff's story as the litigation progressed. At her 50H hearing, plaintiff testified someone shoved a garbage bag into the chute, didn't bother to make sure it went down and instead left it hanging and dripping. At her deposition, she testified she did not see any garbage bag, that she saw the chute was open five to six inches but could not see what was holding it open.[2] Clearly, under both versions of plaintiff's story, before opposing this motion, someone shoved garbage in the chute and left it there, dripping, for someone else to clean up.

And now, in opposition to the motion, she blames everything on the chute door, ignoring her prior testimony that someone jammed too big a garbage bag in the chute and didn't bother to make sure it descended. In her affidavit in support of her cross motion/opposition to NYCHA's motion, plaintiff swears to still another story, her most recent claim – obviously in response to the chute inspector's moving affidavit and monthly report attached thereto, that there was a long standing problem with an improperly working chute door that led to her accident. Now she claims that the bad door, and not people shoving oversized bags into the chute and walking away from broken and dripping garbage bags, is what caused garbage to leak out of bags and drip to the floor. This latest affidavit fails to raise a triable issue of fact for two reasons. First, because it contradicted plaintiff's 50H and deposition testimony, and was tailored to avoid the consequences of such testimony that jammed-in garbage held the chute door open, the affidavit raised only feigned issues of fact (*see e.g., Peralta-Santos v 350 West 49th St. Corp.* 139 AD3d

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[2] According to plaintiff, a five to six inch opening led her to assume something was jammed in; this means even if it improperly closed, it did not leave that much of a gap unless someone failed to make sure their garbage descended.

536, 30 NYS3d 553(Mem) [1st Dept 2016]; *Phillips v. Bronx Lebanon Hosp.*, 268 AD2d 318, 320, 701 NYS2d 403 [1st Dept 2000]). Second, because of the conclusory and vague allegations of any problem with the door - that it did not close all the way does not contradict that fact that it was in working order or indicate a dangerous condition - it does not raise an issue of fact.

Summary

It is claimed that someone tried to shove a garbage bag down a chute and left it, undescended, jamming the chute door open and the garbage bag dripping. Plaintiff claims that she slipped on those drippings. NYCHA met its burden to show that it did not have constructive or actual notice of the spill, and that it cleaned/inspected the hallway twice that day. NYCHA showed a monthly inspection of the garbage chute conducted eleven days before the accident, the report of which shows the door properly closed. Thus, NYCHA met its burden.

In opposition, plaintiff failed to raise an issue of fact and no trial is necessary. Plaintiff did not contradict the lack of actual notice of the spill and had no idea how long the substance was on the floor before she fell. Thus there was no issue of fact as to actual or constructive notice of the spill.

As for the chute door, plaintiff's claim of an improperly closing door is too vague to contradict the inspector's affidavit and report that the door worked properly. By failing to provide an expert report, pictures or other proof to specify exactly how far the door closed when it wasn't jammed open with garbage, plaintiff has not contradicted NYCHA's proof. And even if it did contradict the inspector, it is a feigned issue because it contradicts her 50H and deposition testimony, which swears that garbage was jamming the door open because someone walked away

without making sure their garbage went down the chute. Finally, the allegation in the notice of claim that the chute was too small for its purpose is belied by plaintiff's most recent affidavit, where she swears that since the door was replaced, no one has been unable to get their garbage fully into the chute.

Accordingly, it is

ORDERED that the cross-motion by plaintiff is denied, and it is further

ORDERED that the motion by NYCHA to dismiss all claims against it is granted, and this action is dismissed.

This is the Decision and Order of the Court.

Dated: August 2, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC