

Barger v Only Props., LLC
2017 NY Slip Op 30842(U)
April 17, 2017
Supreme Court, Kings County
Docket Number: 507276/2013
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of April, 2017.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

----- X
CAITLIN BARGER

Plaintiff,

- against -

ONLY PROPERTIES, LLC,

Defendant.
----- X

DECISION/ORDER

Index No. 507276/2013

Motion Seq. Nos. 5, 7, 8, 9

The following papers number 1 to 15 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

1-3, 4-6, 10-11, 13-14

Opposing Affidavits (Affirmations) _____

7-8, 9, 15

Reply Affidavits (Affirmations) _____

12

_____ Affidavits (Affirmations) _____

Other Papers _____

Upon the foregoing papers, defendant moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint. Plaintiff cross-moves for an order, pursuant to CPLR 3212, granting her partial summary judgment on the issue of liability. Also, defendant moves for an order, pursuant to CPLR 3126 (3), striking allegedly new and untimely allegations in a supplemental bill of particulars. Lastly, plaintiff cross-moves for

an order, pursuant to CPLR 3402 and 3042, granting her leave to serve and file a supplemental or amended bill of particulars.

Background

The complaint asserts that on December 21, 2012 plaintiff slipped and fell on stairs while working for non-party Tribeca Kitchenette, a bakery that leased part of the improved premises known as 156 Chambers Street in Manhattan. Defendant owns the premisses. Plaintiff suffered injuries as a result of her fall. The complaint alleges several defects in the stairway and claims that such defects proximately caused her injuries.

Defendant interposed an answer; discovery and motion practice ensued. On September 28, 2015, plaintiff filed a note of issue with a jury demand and thereby asserted that the action is ready for trial. Defendant moved for summary judgment dismissing the action. Plaintiff responded with both a cross-motion for summary judgment and a purported supplemental bill of particulars that contains several allegations of statutory and building code violations. In counter, defendant moved to strike the purported bill of particulars; plaintiff responded with a motion for leave to amend her pleading. These four motions are presently before this Court.

Defendant's Arguments In Support Of Its Motion For Summary Judgment

In support of its motion, defendant asserts that it is not subject to liability in this action because it did not possess the relevant area. Defendant acknowledges ownership of the premises; it contends that, nevertheless, it was an out-of-possession landlord when the subject accident occurred. Specifically, defendant points out that its tenant, Tribeca

Kitchenette, exclusively possessed the subject area. Moreover, defendant argues that Tribeca Kitchenette, pursuant to the subject lease agreement, was solely responsible for repairs, maintenance, and compliance with government regulations. Defendant concludes that based upon the lease, coupled with the fact that defendant did not possess the relevant area, it is therefore not subject to premises liability for plaintiff's accident.

Alternatively, defendant asserts that plaintiff cannot demonstrate prior notice of the alleged dangerous condition. Defendant points out that plaintiff is complaining of a slip and fall on a wet¹ flight of stairs. Defendant argues that the record does not contain any suggestion of either actual notice of wet stairs given to its agents or the length of time prior to the accident that the wet condition was noticeable. Moreover, defendant continues, even if plaintiff has demonstrated that the interior staircase violates rules of the Occupational Safety and Health Administration (OSHA)—and further assuming that such violations caused the accident—plaintiff has not demonstrated that defendant had any notice of such violations. Defendant points out that, indeed, its principal's deposition testimony indicates that no such complaints or violations were forwarded to defendant. Also, defendant reiterates that Tribeca Kitchenette had exclusive possession of the subject area, and adds that defendant's right of entry was limited to inspection of structural building repairs (which do not apply here).² Also, defendant avers that the record contains no evidence of constructive

¹ Defendant occasionally refers to it as a "slushy/slippery" condition.

² More specifically, plaintiff claims that defendant's deposition witness testified that he had never seen (let alone inspected) the interior staircase.

notice of the wet stairs condition. Specifically, defendant contends that constructive notice requires evidence in the record that the alleged defect was visible for a sufficient length of time. Here, defendant continues, the record contains no suggestion of how long the slippery condition existed (or was visible) prior to the accident. Moreover, defendant adds, a slippery condition caused by mopping is necessarily transient and does not exist for long.³ Lastly, defendant notes that the record contains no suggestion that defendant's agents caused the slippery condition.

Finally, defendant adds other arguments in favor of dismissing the action. Defendant asserts that the slippery condition was open and obvious, as established by her testimony that she noticed the condition while she traversed the stairs several times prior to the accident. Thus, defendant concludes that it had no duty to warn against the alleged defect. Defendant proffers that plaintiff assumed the risk of slipping on the stairs; therefore, reasons defendant, plaintiff may not recover damages for her injuries. Hence, defendant requests this Court to grant its motion and dismiss the action.⁴

³ Plaintiff advanced the contention that Tribeca Kitchenette workers complained among themselves of the condition of the stairs. Defendant counters by stating both that this contention is uncorroborated and that complaints among a tenant's workers does not constitute notice to a landlord.

⁴ Defendant submits the affidavit of professional engineer Stan A. Pitera, who opines that the subject stairway was properly constructed and maintained, and complied with all applicable building codes. Defendant also submits pictures of the stairway.

Plaintiff's Arguments In Support Of Her Motion For Summary Judgment And In Opposition To Defendant's Motion For Summary Judgment

In opposition to defendant's motion, and in support of her motion for summary judgment, plaintiff first asserts both that the stairway was defective and that the defects proximately caused her injuries. Specifically, plaintiff identifies the following defects in the subject stairway: it did not have full handrails on both sides, the stair treads were not aligned, steel treads were chronically slippery, and the tread slope was excessive. She claims that the accident occurred when she was descending the stairs and her foot suddenly slipped; she then reached out to grab a handrail but none were near her. Thus, she infers, the absence of a handrail (among the other alleged defects) was a proximate cause of her injuries. Lastly, she contends that the condition of the stairway violated several state and municipal building codes, federal workplace regulations and state statutes.

Next, plaintiff attacks allegedly "false" arguments made by defendant. First, plaintiff states that, contrary to defendant's assertion, the applicable lease agreement does not limit defendant landlord's right of re-entry to structural inspection and repairs. Consequently, in accordance with the lease, defendant retained the right to inspect the premises for any reason, including the condition of the subject stairway. Plaintiff adds that, in any event, a landowner's duty to keep premises safe is nondelegable. It follows, plaintiff continues, that defendant had constructive notice of the condition of the stairway. Plaintiff points out that defendant, in 2006, leased the premises to Tribeca Kitchenette "as-is"—accordingly, defendant is properly charged with knowledge of the condition of the stairway since then.

Next, plaintiff asserts that both the assumption of risk and open and obvious arguments are inapplicable here since plaintiff was an employee of Tribeca Kitchenette who was required to traverse the stairs as part of her employment. Indeed, plaintiff proffers, the deposition of defendant's principal was at least equivocal as to his understanding of defendant's rights and duties pursuant to the lease agreement. Therefore, the record does not support defendant's arguments.

Also, plaintiff advances other arguments supporting her motion. Plaintiff maintains that since she has established that several safety code violations contributed to her accident, the defendant landowner is subject to absolute liability, that is, per se negligence—suggesting that fault or notice need not be shown. Alternatively, plaintiff claims that the various violations demonstrate several breaches of the applicable duty of care. Plaintiff asserts that defendant's contractual right to enter the premises belies the contention that defendant was an out-of-possession landlord. Accordingly, reasons plaintiff, defendant had notice of the condition of the premises, including all hazards thereon. Specifically, plaintiff contends that defendant had constructive notice of every defect in the stairway because defendant could have inspected it at defendant's leisure. Also, plaintiff argues that defendant had actual notice of any existing stairway hazards (i.e. absence of handrails) when the premises was leased to Tribeca Kitchenette.

Lastly, plaintiff claims that there is no serious dispute that it was foreseeable that the hazardous condition of the stairway could cause a slip and fall accident. Accordingly, the defective stairway is the proximate cause of her injuries. Plaintiff asserts that the statutes and

safety codes she cited were designed to protect her and those in similar situations (e.g. other Tribeca Kitchenette workers as well as customers). Plaintiff argues that since the accident occurred while she was working, both Labor Law § 200 and OSHA regulations are implicated; specifically, proof of OSHA violations may constitute proof of negligence. Here, plaintiff adds, there is no dispute that an OSHA violation existed, as evidenced by correspondence in the record. Plaintiff concludes that the record establishes that defendant's breach of the duty of care proximately caused her injuries, and argues that this Court should deny defendant's motion and grant her motion for summary judgment.⁵

Defendant's Arguments In Opposition To Plaintiff's Motion For Summary Judgment

In opposition to plaintiff's motion, defendant first argues that plaintiff is mischaracterizing the record in an attempt to convince this Court that a structural defect in the stairway existed. Defendant claims that plaintiff's deposition testimony established that she slipped and fell on the stairs because of slippery residue after the stairs were mopped. Now, however, argues defendant, plaintiff is shifting her position to include claims that the stairway was poorly built and maintained. Defendant contends that notwithstanding plaintiff's present allegations, the overwhelming evidence in the record suggests that a foreign substance, and not the condition of the stairs, caused her to slip and fall.

⁵ Plaintiff submits the affidavit of professional building inspector Alvin Ubell, who reaches, in substance, the same conclusions concerning the condition of the stairway as presented in plaintiff's arguments. Plaintiff also submits pictures of the stairway.

Next, defendant states that its contractual right to enter the premises does not, contrary to plaintiff's argument, equate to constructive notice of alleged stairway defects. Defendant maintains that an out-of-possession landlord has constructive notice of defects only when it has the right to enter the property and a significant structural defect exists that is contrary to a specific statutory provision. Here, defendant continues, plaintiff slipped and fell on wet stairs; no significant structural defect exists. Also, defendant adds, plaintiff has not identified a specific statutory provision in her bill of particulars. Defendant argues that to the extent that plaintiff is now claiming statutory violations, defendant characterizes the same as an untimely attempt to amend her pleadings that should not be permitted by this Court. Defendant points out that, in any event, many of the alleged code violations do not apply to either the building or the subject stairway—plaintiff either mischaracterizes the subject stairway or fails to take the age of the building into account. Also, defendant states that its agents never received any prior complaints or claims concerning the subject stairs. In sum, defendant claims that it cannot be liable for plaintiff's injuries, as it neither created nor had notice, actual or constructive, of the slippery stairs.

Moreover, defendant argues that plaintiff has improperly attempted to amend her bill of particulars to include newly alleged statutory or regulatory violations. Defendant notes that in March of 2014 plaintiff served a bill of particulars that alleged four such violations. However, in February of 2016—almost five months after a note of issue was filed—plaintiff served a purported supplemental bill of particulars (without leave of Court) that includes approximately twenty additional alleged violations of statutes and regulations. Defendant

characterizes plaintiff's litigation strategy as an attempt to reframe this action as a slip and fall caused by the condition of the stairs instead of one caused by a slippery substance. Defendant reiterates that it was never plaintiff's employer or residential landlord; defendant claims that the newly-pled violations do not apply to it. In any event, this Court should not permit plaintiff to allege new statutory or regulatory violations at this late stage in litigation.

Also, defendant challenges the reasoning used by plaintiff's building inspector. First, defendant notes that the inspector seems to make conclusions about medical conditions despite a lack of such professional credentials. Next, defendant notes that the subject building was constructed earlier than the enactment of the building codes identified by the inspector; defendant reasons that such codes are thus not applicable. Defendant points out that the inspector concludes that the subject building violates the Multiple Dwelling Law notwithstanding the fact that the subject stairs are not part of a residence. Most of the alleged violations (such as an alleged loose electrical box), have nothing to do with the subject accident—a slip and fall on stairs. Defendant asserts that the inspector's affidavit is thus unsubstantiated, and, therefore, should be ignored by this Court.

Additionally, defendant alleges that plaintiff's remaining arguments are meritless. First, plaintiff has not pled a Labor Law claim therefore, plaintiff should not now be heard to allege violations of the Labor Law. In any event, a landowner's Labor Law § 200 violation depends on the same facts as an ordinary premises liability case: the landowner either created the alleged defect or had notice, actual or constructive, of same. And any alleged OSHA violations are attributable to her employer, and not the defendant landowner.

Also, reading defendant's principal's deposition testimony indicates that plaintiff's characterizations of that testimony (such as the allegation that he did not know what a right to enter the premises was) are intended to mislead this Court. Indeed, defendant concludes, plaintiff appears to desperately resort to casting shade on defendant and its principal as a last-resort litigation strategy. For these reasons, defendant asks this Court to grant its motion dismissing the action and deny plaintiff's cross-motion.

Defendant's Arguments In Support Of Its Motion To Strike Allegations In Supplemental Bill Of Particulars

In support of its motion to strike the purported supplemental bill of particulars, defendant reiterates its prior argument: plaintiff is attempting to raise new theories of liability well after the note of issue was filed. These newly-alleged violations of statutes and regulations goes far beyond what was pled in the bill of particulars. Also, defendant points out that plaintiff should have sought leave of Court before purporting to belatedly supplement her bill of particulars. For these reasons, defendant concludes that if the action is not dismissed, this Court should grant the motion to strike the new allegations.

Plaintiff's Arguments In Support Of Her Motion For Leave To Supplement Or Amend Her Bill Of Particulars

Plaintiff argues that this Court should either grant her leave to amend her bill of particulars or deem her supplemental bill of particulars properly served nunc pro tunc. Plaintiff claims that her amendments are neither palpably improper nor causing prejudice to the defendant because the amendments do not allege additional facts. Plaintiff asserts that she is simply specifying the precise statutes and regulations that defendant has allegedly

violated. She further states that mere lateness does not constitute prejudice. Plaintiff reiterates that the subject stairway had structural defects, and, therefore, that the defendant landowner has known of these claims since the action was commenced. For these reasons, plaintiff concludes that this Court should grant her motion for leave to amend her bill of particulars.

Discussion

The Court first considers the motions for summary judgment. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a summary judgment motion will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

Proponents of a motion for summary judgment must first demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*,

68 NY2d at 324; *see also* *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If this burden is met, the Court must evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Spodek v Park Property Dev. Assocs.*, 263 AD2d 478 [2d Dept 1999]). “[A]verments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily decided (*Andre*, 35 NY2d at 364).

Defendant, as the owner of the subject premises, owes to those on the premises a duty of reasonable care under the circumstances to maintain the premises in a safe condition (*Tagle v Jakob*, 97 NY2d 165 [2001]). Moreover, “[a] landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Romano v Omega Moulding Co. Ltd.*, 57 AD3d 873, 874 [2d Dept 2008], quoting *Peralta v Henriquez*, 100 NY2d 139, 144 [2003] and *Basso v Miller*, 40 NY2d 233, 241 [1976]; *see also* *Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]). Therefore, defendant owed plaintiff, who was lawfully on the premises, a duty of care.

However, “[t]he mere happening of the accident does not establish liability on the part of the defendant” (*Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 251 [1st Dept 1984], *affd* 64 NY2d 670 [1984]). Contrary to plaintiff’s contention, defendant is not subject to strict or per se liability because it is the landowner. Instead, to impose premises liability, there must be evidence “that the dangerous condition existed and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Davis v Rochdale Vil., Inc.*, 63 AD3d 870, 870-871 [2009], citing *Gordon v American Mus. of Nat. Hist.*, 67 NY2d 836 [1986] and *Moody v Woolworth Co.*, 288 AD2d 446 [2d Dept 2001]).⁶

Here, the dangerous condition that caused plaintiff to slip and fall was the wet and slippery condition. As plaintiff testified, the condition was caused by a Tribeca Kitchenette co-worker. Since this co-worker was not an agent of defendant, there is no evidence that the condition was created by defendant. Also, the record indicates that defendant had no agents present on the premises and was not informed of the slippery condition, thus defendant did not have notice, actual or constructive, of the dangerous wet, slippery condition (*see e.g.*

⁶ The Court agrees with plaintiff that defendant is not an out-of-possession landowner. Such an owner “is generally not liable for injuries resulting from the condition of the leased premises” (*Rosas v 397 Broadway Corp.*, 19 AD3d 574, 574 [2d Dept 2005]; *see also Torres v West Street Realty Co.*, 21 AD3d 718, 721 [1st Dept 2005], *lv denied* 7 NY3d 703 [2006]; *Stickles v Fuller*, 9 AD3d 599 [3rd Dept 2004]; *Voss v D&C Parking*, 299 AD2d 346 [2d Dept 2002]; *Abrams v Berelson*, 283 AD2d 597 [2d Dept 2001]). However, the owner is still subject to premises liability if it “retained control of the premises . . . or is obligated . . . to perform maintenance and repairs” (*Yehia v Marphil Realty Corp.*, 130 AD3d 615, 616 [2d Dept 2015]). Here, defendant has not shown that it is free of such obligations (either through the lease agreement or statutes and regulations). Nevertheless, and contrary to plaintiff’s argument, the claims must be dismissed because defendant neither caused nor had notice of the condition that caused the accident.

Ingram v Long Is. Coll. Hosp., 101 AD3d 814, 815-816 [2d Dept 2012] [describing sworn testimony that established lack of constructive notice]). Accordingly, defendant is not subject to premises liability in this matter.

Plaintiff's protestations to the contrary lack merit. Plaintiff attempts to convince this Court that the accident was caused (in part) by structural defects in the stairway; the affidavit of her purported expert supports this theory and identifies several alleged building code violations. However, "the expert failed to establish that the cited building code provisions were in effect when the subject stairs and handrails were constructed" (*Baterna v Maimonides Med. Ctr.*, 139 AD3d 653, 654 [2d Dept 2016]). Additionally, given that the alleged dangerous condition that caused plaintiff to slip had nothing to do with the construction of the stairs and handrails, "the expert failed to raise a triable issue of fact as whether the alleged building code violations or negligent design were a proximate cause of the plaintiff's fall" (*id.* citing *Hyman v Queens County Bancorp, Inc.*, 3 NY3d 743 [2004]; *LaPera v Montana*, 124 AD3d 844, 845 [2d Dept 2015]; *see also Jackson v Michel*, 142 AD3d 535, 536 [2d Dept 2016] ["the defects identified by the plaintiff's expert in his report were not relevant, as they were not the conditions alleged by the plaintiff to have caused her accident"], citing *Outlaw v Citibank, N.A.*, 35 AD3d 564, 565 [2d Dept 2006]). Since plaintiff and her co-workers apparently used the staircase several times a day without incident, any of the alleged defects in the stairway are physically insignificant and not actionable (*see e.g. Jackson v Michel*, 142 AD3d 535 [2d Dept 2016]). In sum, plaintiff's current arguments alleging shoddy construction and maintenance of the stairway are

insufficient to distract this Court from the fact that it was her co-worker's mopping that caused her to fall (*see e.g. Hyman v Queens County Bancorp, Inc.*, 3 NY3d 743 [2004] [noting that plaintiff failed to raise issue of fact by stating that handrail was out of reach]; *see also Sobenis v Harridge House Assoc. of 1984*, 111 AD3d 917 [2d Dept 2013] [no liability for property owner under Labor Law or common-law negligence doctrine where accident was caused by means and methods of work performed by plaintiff's employer]). For these reasons, defendant's motion for summary judgment is granted and plaintiff's is denied.

Lastly, the Court grants defendant's motion to strike the purported supplemental bill of particulars and denies plaintiff's motion for leave to amend the bill of particulars. Although such leave, pursuant to CPLR 3025, is generally freely given absent prejudice or surprise, such leave should be denied when "the proposed amendment is palpably insufficient or patently devoid of merit" (*Calamari v Panos*, 131 AD3d 1088, 1089 [2d Dept 2015] [internal quotation marks omitted]). As stated above, the cause of plaintiff's accident was the slippery wet condition of the stairs and not any alleged defect in the stairway. However, the proposed amendments are replete with alleged building code and statute violations relating to the stairway.⁷ Since the condition of the stairway is not a proximate cause of the accident, the alleged violations are immaterial, and this Court will therefore not permit plaintiff's proposed amendments. Accordingly, it is

⁷ Plaintiff also fails to establish that such statutes or regulations are even applicable. For example, plaintiff alleges violations of the Multiple Dwelling Law but does not identify facts in the record to suggest the subject building qualifies as a multiple dwelling.

ORDERED that the motion of defendant Only Properties, LLC for summary judgment is granted, and the instant action is dismissed; and it is further

ORDERED that the motion of plaintiff Caitlin Barger for summary judgment is denied; and it is further

ORDERED that the motion of defendant Only Properties, LLC to strike plaintiff's purported supplemental bill of particulars is granted; and it is further

ORDERED that the motion of plaintiff Caitlin Barger for leave to amend her bill of particulars is denied.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. GENINE D. EDWARDS

Nancy T. Sunshine

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KINGS COUNTY CLERK
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