Barr v Washington Flats LLC
2017 NY Slip Op 32312(U)
October 31, 2017
Supreme Court, Kings County
Docket Number: 502116/12
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9
--X

MICHAEL BARR,

Plaintiff,

-against-

WASHINGTON FLATS LLC,

Defendant.
--X

DECISION/ORDER

Index No. 502116/12
Mot. Seq. No. 4
Motion Sub. 10/5/17

HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of defendant's motion for summary judgment dismissing the complaint

Papers	Numbered
Notice of Motion, Affirmation and Exhibits..	1-13
Affirmation in Opposition	
Reply Affirmation	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant Washington Flats LLC, the sole defendant, moves for summary judgment dismissing the plaintiff's complaint in this personal injury action. Plaintiff's default is puzzling as this action is on the trial calendar. Despite plaintiff's default, the motion is denied, as defendant has failed to make out a prima facie case for dismissal.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]. He must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. *(id.)* Where the movant has

established a prima facie showing of entitlement to summary judgment, the motion, if unopposed on the merits, shall be granted. (See *Karademir v Mirando-Jelinek,* 153 AD3d 509 [2nd Dept 2017]). It is clear that notwithstanding a default by the other side in opposing a summary judgment motion, a movant is still required to establish a prima facie showing of entitlement to the relief requested.

This is an action that arises from injuries sustained by plaintiff when, on July 29, 2012, he tripped and fell while descending an allegedly defective staircase in the interior hallway of 425 Grand Avenue, Brooklyn, New York, a residential building with 48 apartments owned and operated by defendant.

In moving to dismiss, the defendant argues that plaintiff cannot identify the alleged defect that caused his accident; that there is no evidence that defendant created or knew of the purported defect; and that defendant did not own the subject premises on the accident date.

In support of the motion, movant annexes as exhibits the summons and verified complaint, the verified answer, plaintiff's bill of particulars, plaintiff's supplemental bill of particulars, the note of issue, plaintiff's EBT, the EBT of non-party witness Pamela Catherine Hicks, the EBT of defendant's witness, Yechiel Weinberger, and copies of filings with the City Register from ACRIS regarding the subject premises.

Movant contends that records filed on ACRIS prove it did not own the building on March 2, 2016. The evidence does show that to be the case, however, plaintiff's accident took place on July 29, 2012, and the documents annexed by defendant show that it did own the subject premises on that date. Thus, movant's claim on this basis fails.

Movant next contends that the EBT testimony establishes that neither the plaintiff, who was a frequent visitor to the building, nor non-party witness Hicks, a tenant at the building, could identify what precise defective condition caused plaintiff to fall. While it is accurate to say that Ms. Hicks could not identify the exact step which allegedly caused plaintiff's fall, plaintiff was able to specify that he fell "on the third stair going down" from the second floor, as he was headed toward the first floor. He describes "my foot slipped out and that is when I lost my balance," and claims this happened because his left heel became caught in a crack in the step. He noted that he had seen the crack before, on prior visits [Plaintiff's EBT 55-59]. He testified that he landed on his hands and knees after tumbling to the bottom of the steps. Thus, this claim by defendant fails as well.

As evidence for the defendant's alleged lack of actual or constructive notice of the defect in the step, movant avers that plaintiff has failed to offer any evidence on the issue of notice. Movant cites testimony by plaintiff that he never made a complaint about this condition, and testimony by Ms. Hicks that she could not remember whether she had ever made such a complaint. Movant also cites the testimony of Mr. Weinberger, the property manager, that neither he, his porter or his building super-intendent were aware of the defect testified to by plaintiff.

This is not sufficient to make out a prima facie case for summary judgment. "A defendant who moves for summary judgment in a slip-and-fall or trip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of the condition for a sufficient length of time to discover and remedy it." (*Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2d Dept 2013]. (See also *Levine v*

Amverserve Assn., Inc., 92 AD3d 728 [2d Dept 2012]; *Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011]; *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909, 910 [2d Dept 2011]; *Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598, 599 [2d Dept 2010]).

In order to meet its burden of proof on the issue of defendant's claim of lack of constructive notice, the defendant must offer some evidence as to when the area where the accident took place was last cleaned or inspected prior to the plaintiff's fall. (See *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456; *Levine v Amverserve Assn.*, Inc., 92 AD3d 728; *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 910; *Amendola v City of New York,* 89 AD3d 775; *Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598, 599). A movant cannot satisfy this burden merely by pointing to gaps in the plaintiff's case (See *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456; *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 910; *Amendola v City of New York*, 89 AD3d at 775; *Cummins v New York Methodist Hosp.*, 85 AD3d 1082, 1083 [2d Dept 2011]).

On this claim, the defendant has failed to establish, prima facie, that it lacked actual or constructive notice of the allegedly hazardous and defective step, the condition which allegedly caused the plaintiff's fall, because it has offered no evidence as to when the subject stairway was last cleaned or inspected prior to plaintiff's accident. (See *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456; *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 910; *Amendola v City of New York*, 89 AD3d 775, 776; *Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598, 599).

It is also noted that, other than Mr. Weinberger's EBT testimony, (Exhibit I) which merely states that he was unaware of the alleged defect prior to the date of plaintiff's accident, movant does not provide any evidence in admissible form that the step on the staircase did not have the alleged defect. Mr. Weinberger testified in 2014 that when

he received notice of plaintiff's lawsuit in 2012, he spoke with the super and the porter and neither of them were aware of plaintiff having had an accident, nor were they aware of who plaintiff is. However, by the time of the EBT in 2014, the superintendent had died and the porter (whose last name Mr. Weinberger did not know) no longer worked for defendant [Page 19-20]. Thus, Mr. Weinberger's statements, about what the super and porter told him, is hearsay which cannot be corroborated. When asked if he was familiar with the building, he said [Page 9 Lines 17-19] "I own it," then, "as part of the LLC." Mr. Weinberger did not testify that he had personally looked at the place where plaintiff claimed to have fallen. From his EBT testimony, it is clear that he was under the impression that plaintiff had slipped because of water from mopping, and he disputed this could have happened, as he pointed out that the porter is not on duty at 7:30 p.m. [Page 30]. There are no photographs or expert's reports in defendant's motion papers. Plaintiff was deposed several months before Mr. Weinberger. His EBT is Exhibit G to defendant's motion. Plaintiff is clear in his testimony that his fall was caused by a defect in the step.

Finally, a defect in the nosing or walking surface of a step has been held to be actionable as long as it is not trivial. *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015].

Since the defendant has failed to meet its prima facie burden, plaintiff's lack of opposition papers is immaterial. As such, the motion is denied.

The foregoing shall constitute the decision and order of the court.

Dated: Brooklyn, New York
October 31, 2017

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court