Hilsen v Hamilton HDFC
2018 NY Slip Op 30908(U)
May 10, 2018
Supreme Court, New York County
Docket Number: 161604/2014
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

RITA HILSEN,

Plaintiff,

- v -

HAMILTON HDFC and FIND AID FOR THE AGED, INC. a/k/a PROJECT FIND,

Defendants.

INDEX NO. 161604/2014

MOTION DATE 5/7/2018

MOTION SEQ. NO. 002

NYSCEF Doc Nos. 30–56 were read on this motion for summary judgment.

Motion by Defendants Hamilton HDFC ("Hamilton") and Find Aid for the Aged, Inc. a/k/a Project Find ("Project Find") pursuant to CPLR 3212 for summary judgment against Plaintiff Rita Hilsen ("Hilsen") is denied.

BACKGROUND

In the instant action, Hilsen alleges that, on December 14, 2013, she was attempting to open a window in her apartment's living room, when she felt a pain in her back. (Affirmation of Brescia, exhibit C [Amended Complaint] ¶¶ 15, 36; exhibit F [Hilsen EBT] at 34 lines 5–20.) Plaintiff alleges that subsequent MRI testing revealed that she suffered a fracture of her spine at disc L2. (Affirmation of Brescia, exhibit E [Bill of Particulars] ¶¶ 4, 5.)

Plaintiff further stated that, at the time of the accident, "it was really hot and I needed some kind of air to come in, so I went and pushed on the window to open it and I opened it I guess but my back started to really hurt." (Hilsen EBT at 34, lines 16–20.) Plaintiff stated that "[she] would put [her] hand at the bottom and push to try to open the window." (*Id.* at 27, lines 16–17.) Plaintiff further stated that the temperature in her living room is controlled by a radiator that could be turned on and off by using a valve on the floor. (*Id.* at 31, lines 7–25.)

Plaintiff states that she had been living in the subject residential apartment building, the Hamilton House, since July 2010, which she describes as "a senior facility" with an age requirement of 62 but "not assisted living." (Hilsen EBT at 7, lines 14–16; at 39, lines 4–12.) The Hamilton House is owned by Hamilton and managed by Project Find.

Plaintiff stated that there were two windows in her living room, which were about two to three feet wide and about four or five feet tall, "reinforced by metal so that the metal on the windows was in the form of a tic-tac-toe drawing." (Hilsen EBT at 23, lines 8–10; *see also*

affirmation of Brescia, exhibit G [Gillcrest EBT] at 74, line 21 to 75, line 3 [stating that the windows were 62 inches in height and 53 inches in width].) The windows in the building were apparently last replaced in 2009, with the permission of the New York City Landmarks Preservation Commission. (Affirmation of Brescia, exhibit K [LPC Documents].) According to David Gillcrest, who was employed as Project Find's Executive Director, all of the windows installed in 2009 had "Ultra-Lift Balances, which are designed to make the opening and closing of the windows easier." (Gillcrest EBT at 49, line 24 to 52, line 11.)

Hilsen states that, prior to the date of her accident, she had repeatedly complained to Defendants that the windows needed to be adjusted to make it easier for her to open them. Plaintiff alleges on March 6, 2013, she sent a letter to her building manager, Nick Testa, in which she wrote:

> "I moved here July 1, 2010. Here is a list of repairs or installments to my apartment, some of which I have been asking for since that day. These are minimal things requiring minimal time. I will not be dismissed again with the same b.s. that these issues will be taken care of or that they will and then they won't. THEY MUST BE TAKEN CARE OF, AND NOW, NOT LATER. . . . SOMEONE HAS TO LOOSEN MY WINDOWS. I AM CRIPPLED FROM ORTHOPEDIC INJURIES TO BACK AND SHOULDER AND CAN'T OPEN THEM WITHOUT FURTHER IN JURING MYSELF AND EXACERBATING MY ALREADY VERY SERIOUS PAIN[.]"

(Affirmation of Brescia, exhibit N [Letter to Testa].) Plaintiff further alleges that on June 2, 2013, she wrote to John Calvert, whom she understood to be the Executive Director of Project Find and Mr. Testa's supervisor. In Plaintiff's June 2, 2013 letter, she wrote:

> "I have listed below repairs or exchanges for my apartment at Hamilton House (9 J). Despite having lived here almost three years, asking repeatedly In person and writing for these issues to be resolved, they are not resolved. Instead, Nick repeatedly has said he will deal with them, but has not. This letter is my formal request that the following be dealt with Immediately: . . . 4) My windows must be loosened or replaced because I cannot open or close them. I have several serious, orthopedic injuries (back, right shoulder) which have become exacerbated by my useless, very painful attempts to open or dose the windows. This is a medical issue which must be resolved."

(Affirmation of Brescia, exhibit N [Letter to Calvert].)

On June 6, 2013, a maintenance work order appears to have been issued in which, among other requests, the following is listed as work requested: "Adjust tension or windows so they are easier to open." (Affirmation of Brescia, exhibit L [Maintenance Work Orders].)

On November 21, 2013, Mr. Testa appears to have sent an email to Mr. Calvert and another individual in which he writes that he had just spoken to Hilsen and that she had raised some concerns, among which were:

> "3) Her windows, she can't open them due to back problems. Can any adjustments be made to make the windows easier to open for someone like her? This would be good to know for other tenants as well. Again the tenant said she is willing to make a contribution towards any expense it would cost to make this change."

(Affirmation of Schiowitz, exhibit B [Testa Email].)

On December 9, 2013, a letter appears to have been sent from Plaintiff's doctor, Barrie L. Raik, M.D., to Mr. Testa in which Plaintiff's doctor writes:

> "Another physical problem in her apartment is that the windows are very tight and she is unable to open them. She has had a serious cardiac condition, often gets short of breath and naturally wants to have an open window available. The windows can be adjusted so they are easier to lift, this is essential to her health and well being."

(Affirmation of Schiowitz, exhibit C [Doctor's Letter].)

On December 14, 2013, Plaintiff's accident allegedly occurred. On December 17, 2013 – three days after the alleged accident—a maintenance work order appears to have issued, stating, "WINDOWS—ADJUST BALANCES SO THEY ARE EASIER TO OPEN[.]" (Affirmation of Brescia, exhibit M [Maintenance Work Orders 2].) Right next to this first handwritten statement, there is a second handwritten sentence in a darker ink that says, "NO A[D]JUSTMENT CAN BE MADE TO[] BALANCES." (*Id.*)

The December 17, 2013 maintenance work order was presented to Mr. Gillcrest at his deposition. Mr. Gillcrest stated that he believed that Mr. Testa wrote the first statement, but that he did not know who wrote the second statement. (Gillcrest EBT at 69, line 19 to 74, line 20.) Mr. Gillcrest further stated that the second sentence reflected that if the window was adjusted further it would cause the window to drop: "You could adjust the balance[,] but the window would drop. You can open it[,] but it would close. There is a trade-off, it would not stay open." (*Id.*) Mr. Gillcrest further stated that he had no experience with fixing windows.

ARGUMENT

Defendant argues that the existence of a window—which may have been particularly difficult for Plaintiff to open because of her medical condition—is not a hazardous condition for which they can be held liable for failing to make alterations. Defendants further argue that even if they were negligent, Plaintiff's decision to attempt to open the window—notwithstanding that doing so had caused her injuries previously—was superseding negligence that broke the causal link with any failure on their part to make changes to the window.

In opposition, Plaintiff argues that she repeatedly complained about the condition of her windows and explained that the windows needed to be adjusted to accommodate Hilsen's medical condition and that these complaints went unaddressed. Plaintiff argues that it was "absolutely necessary to open the windows to let fresh air in as the defendants had exclusive control of the temperature in the apartment and it was very hot." (Affirmation of Schiowitz ¶ 6.) Plaintiff further argues that although "there was a valve underneath the radiator to either open or shut off the radiator, there was no way to set the temperature." (*Id.*) Plaintiff further argues that Defendants have submitted no expert affidavit in support of their motion.

In reply, Defendants argue that they had no notice of a dangerous condition and that there could be none because the state of the window was neither dangerous nor defective, and, in fact, it was not even inoperable.

On May 7, 2018, the parties appeared before the Court for oral argument and did not raise any new issues not covered in the papers.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

"To establish their entitlement to summary judgment, defendants were required to demonstrate as a matter of law that they maintained the subject property in a reasonably safe condition and neither created the alleged dangerous condition nor had actual or constructive notice thereof." (*Stryker v D'Agostino Supermarkets Inc.*, 88 AD3d 584, 584 [1st Dept 2012].) "Actual notice may be found where a defendant either created the condition, or was aware of its existence prior to the accident." (*Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 455 [1st Dept 2011].)

At common law, landlords had no duty to maintain leased premises, other than common areas, in good repair. (*See Juarez by Juarez v Wavecrest Mgt. Team Ltd.*, 88 NY2d 628, 643

[1996].) This was changed by the enactment of the Tenement House Act and its successor statute the Multiple Dwelling Law (the "MDL"). (*Id.*) The MDL requires that "[e]very multiple dwelling . . . and every part thereof and the lot upon which it is situated, shall be kept in good repair." (MDL § 78.) The MDL "thus imposes upon a landlord "a duty to persons on its premises to maintain them in a reasonably safe condition." (*Juarez by Juarez*, 88 NY2d at 643.)

Generally, Landlords have no duty to make alterations to an apartment in order to meet the particularized needs of a tenant unless the duty is imposed upon them by statute, regulation, or contract. Otherwise, a landlord's duty to maintain an apartment in a reasonably safe condition is limited to the making of repairs. For example, in *Rivera v Nelson Realty*, LLC, the plaintiff-infant was "seriously burned when he climbed onto an uncovered radiator in his parents' bedroom . . . ." (7 NY3d 530, 532 [2006].) The plaintiffs sued, not on the theory that the particular radiator needed repair or was defective, but that "an uncovered radiator in good working order, though not a hazard in a home occupied only by adults, is dangerous to children." (*Id.* at 535.) The Court of Appeals held that "[n]o duty to remedy this alleged hazard is imposed by the [MDL] or arises under common law by virtue of the lease." (*Id.*) As such, the Court of Appeals reasoned, "any duty to protect children from uncovered radiators remains that of the tenant, unless some other statute or regulation imposes it on the landlord." (*Id; see also Ramos by DeLeon v 600 W. 183rd St.*, 155 AD2d 333, 334 [1st Dept 1989] [holding that, absent a statutory or regulatory duty for landlord to install window guards, "if a window lacking a guard is to be deemed a dangerous condition, any common law duty to eliminate the danger by installing a guard would be the tenant's, not the landlord's"].)

As a matter of law, Defendants only had an obligation to provide Plaintiff with an apartment that was reasonably safe and to make repairs to that apartment—they were not obligated to redesign the apartment to ensure that the apartment functioned to meet Plaintiff's particularized needs. (*See Milano v 340 E. 74th St. Owners Corp.*, 158 AD3d 479, 480 [1st Dept 2018] ["Even if the window or ledge were viewed as a dangerous condition, the duty to eliminate the danger by installing guards or stops was imposed on the tenant, not the landlord, under the common law."].) Neither were Defendants required to provide Plaintiff with multiple functional windows where the closed, nonfunctioning condition of the window is open and obvious and where a landlord has told its tenant not to open the window. (*See Turner v City of New York*, 290 AD2d 336 [1st Dept 2002]; *see also Rivera v St. Nicholas 184 Holding, LLC*, 135 AD3d 496 [1st Dept 2016].)

The instant case is distinguishable from *Turner*. In *Turner*, there was a dispute as to whether the plaintiff was explicitly told by his landlord not to open a certain window, but the Appellate Division, First Department found that subject window had nevertheless been rendered inoperable by the installation of ductwork. Further, the plaintiff had testified that he had previously had difficulty in opening it. The Appellate Division, First Department, in reversing the motion court's denial of the defendants' motion for summary judgment, stated that "it is well settled that there is no duty to warn against a condition which is readily observable." (*Turner*, 290 AD2d at 336.) Here, there is no showing by Defendants that Hilsen's window was rendered inoperable or otherwise afflicted by a condition which was readily observable. Further, there is no showing by Defendants that anyone told Hilsen not to open her window.

The Court finds, based upon movant's submission, that there is no dispute that Defendants did have notice of prior complaints by Hilsen that her window may not have been in good repair prior to her accident. Even after the accident, contrary to Defendants' argument, the maintenance tickets submitted with the instant motion do not indicate whether the window was working properly or repaired satisfactorily. As such, the Court finds that Defendants have failed to show prima facie that the window was not defective or in need of repair. Whether the window was defective, in need of repair, or difficult for Hilsen to open but not otherwise difficult to open for the ordinary person are issues of fact for the jury.

Assuming for the sake of argument that Defendants breached a duty of care, the question remaining for the Court in the instant motion is whether Defendants proximately caused Plaintiff's injury. Based upon the moving papers, the Court finds that there are issues of fact as to whether Defendants proximately caused Plaintiff's injury. In *Cheyney v City of New York*, the Appellate Division, First Department reversed the lower court's dismissal of a complaint at the end of the case, and remanded the case for a new trial, where the plaintiff was injured while attempting to open a window. (47 AD2d 827 [1st Dept 1975].) The plaintiff had previously had difficulty opening the window, and she and others made several complaints about it. The court held that "[t]here were numerous issues of fact as to negligence and contributory negligence:

> "did [a] malfunction exist?;
>
> "was it known or should it have been known to those responsible for proper maintenance?;
>
> "was any attempt made to correct the condition?;
>
> "was plaintiff contributorily negligent in essaying to open the window, with or without added hand pressure, when it failed to function?;
> "or in not selecting the alternative of summoning assistance?;
>
> "or of opening a different window?"

(*Id.* at 827.)

In *Snyder v Moore*, the plaintiff tenants had, over an approximately three-week period, asked their landlord to repair a stuck living room window. (72 AD2d 580 [2d Dept 1979].) The landlord failed to do so. Then, one of the plaintiffs was injured when she fell from a step ladder while attempting to open the window. The landlord defendants argued on their motion for summary judgment that the plaintiff tenant's action had not been foreseeable and that any failure to repair had not proximately caused the injury.

The Appellate Division, Second Department affirmed the motion court's denial of the summary judgment motion in *Snyder*, holding that "[t]he manner in which injuries arise need not be foreseeable; it is only necessary that it be reasonably foreseeable that the defect may cause

some injury." (*Id.* at 581.) The court further held that, where the window had been stuck for about three weeks and the defendants were on notice of the condition but did not repair it,

> "[a] jury might well conclude that it was foreseeable that the tenant would attempt to open the window and possibly sustain injury in the attempt. Any question regarding the plaintiff[]'s choice of methods is one of comparative negligence, not proximate cause. Both foreseeability and comparative negligence are questions for the jury to resolve."

(*Id.*)

In *Gomez v Hicks*, the plaintiff alleged that she was injured when her hand went through the glass portion of a door while she was trying to open it. (33 AD3d 856 [2d Dept 2006].) She and her mother stated that the door was often difficult to open and that they had complained about it to their landlord, the defendant, several times. On an appeal of the motion court's granting the defendant's summary judgment motion, the Appellate Division, Second Department reversed and denied the motion. The court stated that "[a] plaintiff's actions which are extraordinary and unforeseeable will be deemed a superseding cause which severs the causal connection between the defendant's negligence and the plaintiff's injuries." (*Id.* at 856–857.) The court further stated that "[w]hether a plaintiff's act is a superseding cause or whether it is a normal consequence of the situation created by the defendant are generally questions for the trier of fact to determine." (*Id.* at 857.) The court held that the defendant had not shown prima facie that the plaintiff's volitional act of pushing on the stuck door in an attempt to open it was a superseding cause. The court held further that "it cannot be concluded as a matter of law that the plaintiff's action was unforeseeable or of such a character as to sever the connection between the defendant's alleged negligence and the plaintiff's injury." (*Id.*)

In the instant motion, the Court finds that Defendants have failed to show prima facie that Hilsen's act of attempting to push the stuck window open was extraordinary and unforeseeable, and therefore a superseding cause absolving them of liability. As such, the Court need not consider the sufficiency of Hilsen's opposition papers. (*See Winegrad*, 64 NY2d at 853.)

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CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendants Hamilton HDFC and Find Aid for the Aged, Inc. a/k/a Project Find pursuant to CPLR 3212 for summary judgment against Plaintiff Rita Hilsen is denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 10, 2018
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
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☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE