SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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MICHAEL A. SCHIAVONE and CHRISTINE SCHIAVONE,

Plaintiffs,

-against-

Index No. 161990/2015
Motion Sequence No.: 001

Decision and Order

SEAMAN ARMS, LLC,

Defendant,

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Carmen Victoria St. George, J.S.C.:

Plaintiff Michael Schiavone, a retired New York City Firefighter, commenced this action seeking damages for injuries he sustained in the course of fighting a fire on the roof of a building owned by defendant Seaman Arms LLC. According to the complaint, on September 27, 2014, Michael Schiavone and his FDNY unit were notified of a fire on the top floor of 72 Seaman Avenue, New York, New York. Plaintiff alleges that he was required to go to the roof of the building and aid in the outside ventilation of the building. While plaintiff was on the rooftop performing his duties, he alleges that he tripped and fell over debris that was present on the rooftop. At the time of the accident, plaintiff was attempting to use his "halligan hook," essentially a large and specialized crowbar, to pry up sections of the roof that had been cut by a probationary firefighter, Utniel Calderone. Plaintiff claims that he sustained serious and permanent injuries as a result of defendant's neglect in leaving broken wood pieces and roofing materials on its roof. The complaint asserts a claim for common law negligence and causes of action under General

Municipal Law ("GML") Section 205-a and General Obligations Law ("GOL") Section 11-106. Regarding the former, plaintiff alleges violations of New York City Housing Maintenance Code, subchapter 2, Article II, § 27-2010, New York State Multiple Dwelling Law § 78(1), and New York City Administrative Code § 28-301.1 (2014). Currently, defendant moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint. Plaintiffs oppose the motion. For the reasons below, the Court denies the motion.

Contentions

Defendant asserts that it is entitled to summary judgment because it did not cause or create the condition and it had neither actual nor constructive notice of the condition that caused plaintiff's injuries. In support, defendant relies on the deposition testimony of its Resident Manager Ognen Klaric, in which he stated, *inter alia*, that only he has a key to the roof, the doors to the roof are locked, he inspects the roof at least once a month, and he never saw debris of any sort on the roof prior to the fire. At Klaric's deposition, he explained that his job duties as a resident manager include "maintaining the building in all areas…making sure…the building is clean in all areas" (defendant's exhibit C at 8). Notably, Klaric testified that in the entire thirteen years that he has been resident manager, there had been no roof work involving lumber or tar paper of the sort plaintiff described seeing after he had fallen. Klaric further explained that the only roof maintenance that had been needed during that time was minor roof cracks, which he performed himself using "liquid tar" (*Id.* at 57). Klaric also stated that he never hired a third party to perform work on the roof. Further, Klaric testified that he inspected the roof later on the morning of the incident, after the fire had been extinguished and shortly after fire personnel had left. Klaric explained that the only debris he saw was from the hole cut by the firefighters. According to the

defendant, Klaric's testimony establishes that defendant did not create or have notice of any of the debris over which plaintiff could have tripped.

Defendant further argues that affirmative evidence shows that plaintiffs cannot establish causation without speculation. Defendant maintains that plaintiff's own testimony establishes that he does not know what caused his fall, and only speculation can attribute it to anything besides the debris he and his fellow firefighters themselves created. In support, defendant points to plaintiff's testimony wherein he stated that as the roof came up in response to his pulling, he stepped back and tripped over "something" (defendant's exhibit A at 270, 272). He further testified "I stepped on something that at the time, I didn't know what it was" (*Id.* at 270). Defendant argues that plaintiff repeatedly testified that he had no idea what he tripped over, either when he fell or when he picked himself up off the ground. Defendant relies on plaintiff's testimony in which he stated, "[a]t the moment, I didn't know what it was because I didn't notice anything on the roof" (*Id.* at 273). Defendant also points out that Utniel Calderon, the probationary firefighter working on the roof with plaintiff, testified that he did not notice any debris during his perimeter search of the roof. When asked if he recalled there being anything that would have blocked his route of travel, Calderon testified "I don't remember anything stopping me" (defendant's exhibit B at 127). This evidence, defendant argues, establishes plaintiff and his colleague did not encounter any debris until after their own firefighting activities started creating it.

In addition, defendant asserts, that dismissal of plaintiffs' common law negligence claims necessitates dismissal of their claims under General Obligations Law § 11-106, because the statute simply authorizes firefighters and police officers to bring common-law negligence claims under certain circumstances. As for the claims under GML § 205-a, defendant argues that even if a

building code violation was established, plaintiff's failure to identify the cause of his fall leaves him unable to establish a causal relationship between any alleged violation and his accident.

In opposition, plaintiffs argue that there are several triable issues of material fact in this matter requiring defendant's motion for summary judgment to be denied. First, plaintiffs dismiss defendant's contention that plaintiff never actually knew or saw what he tripped over on the date of the incident and instead speculated as to what he tripped over. Conversely, they argue that plaintiff testified with specificity regarding what he tripped over. At his deposition, plaintiff testified that his firehouse was the first to respond to the fire and they were the first to make any cuts in the roof. When plaintiff got to the roof of 72 Seaman, he testified that he didn't see anything around him on the roof. Plaintiff further testified that he directed Calderon to make cuts in the roof of the building. After the initial cuts were made and prior to any roofing material being extracted from those cuts, plaintiff testified that he inserted a halligan hook to pull the roofing up to relieve the smoke and heat of the fire in the apartment (plaintiff's exhibit C at 132). Plaintiff explained that the force of his pull on the halligan hook and the roof material giving way led plaintiff to take a step back due to his backwards momentum. Plaintiff testified that his right foot stepped on something that caused him to lose his footing. He further testified that the material over which he tripped felt "loose," when he made contact with it and that "it felt like debris" *(Id.* at 273). Plaintiff testified, "I stepped on something that at the time, I didn't know what it was…because I didn't notice anything on the roof" (*Id.* at 270, 273). Plaintiff explained that he fell straight on his back and the oxygen tank hit his spine. In light of this testimony, plaintiffs surmise that the first set of material extracted from the roof was in front of plaintiff when he tripped over debris on the roof located several feet behind him.

Plaintiffs' opposition papers further emphasize that plaintiff made no assumptions regarding the cause of his fall and instead made a direct observation of the roofing material once he stood up from his fall. Again, they rely on plaintiff's deposition transcript in which he described that material on which he had fallen on as "a pile of like roofing material/wood" (*Id.* at 287)... "wood roof boards and roofing material from a prior repair" (*Id.* at 293)... "a small pile" of "roofing material" including "roofing tar, same stuff they put down on a roof, wood boards, broken up wood boards, about two foot, two and a half foot" (*Id.* at 295). When asked to describe where the small pile was located on the roof, plaintiff responded "I don't remember seeing it until I fell over it. I mean, it was 4:30 in the morning. It was pretty dark. It was smoky. There was a lot going on. I don't remember any lights being up there. Its black, dark roofing material" (*Id.* at 300). Plaintiff further explained "[i]t was low piles, maybe three inches, four, five inches high. It was pretty low. It was not stacked very nicely. It was just kind of laying there. I honestly don't remember seeing it until I had gotten up" (*Id.*). Notably, plaintiff also testified that he was familiar with what roofing repair materials looked like due to his prior experience in construction. Given the above, plaintiffs state, a triable issue of material fact has been raised regarding whether plaintiff is speculating as to what he tripped over.

Next, plaintiffs argue that there is a triable issue of material fact as to the condition of the roof prior to the FDNY cutting a hole and extracting the roofing membrane. They assert that testimony of Klaric and the plaintiff directly conflict in that Klaric directly testified that there was no debris on the rooftop prior to the incident in question and instead plaintiff must have tripped over debris that had been extracted by the FDNY from the roof that morning (plaintiff's exhibit G at 31). Conversely, plaintiff testified that he tripped over roofing materials that were on the roof prior to the fire (plaintiff's Exhibit C at 293). Plaintiffs aver that the only proper avenue for

determining what the conditions were on the rooftop on the morning of the incident is for the trier of facts to determine.

Furthermore, plaintiffs argue that defendant's reliance on Calderon's and plaintiff's own testimony for the proposition that having missed seeing the debris over which plaintiff tripped and fell is concrete evidence that there was no roofing material on the roof prior to the fire is misleading. Rather, plaintiffs emphasize that both firefighters testified that when the incident took place there were poor vision conditions on the roof as it was nighttime, smoky from the fire, and became chaotic. It is plaintiffs' position that this poor visibility coupled with the fact that the plaintiff tripped over a pile of dark colored roofing materials raises a triable issue of material fact as to whether the pile could have gone unnoticed by plaintiff and Calderon until the point in time when plaintiff fell over the debris.

In addition, plaintiffs assert that a triable issue of material fact has been raised regarding whether the defendant's culpable conduct in placing debris on the rooftop prior to the incident, or in the alternative, allowing the debris to exist on the rooftop prior to the fire. Plaintiffs point to Klaric's testimony in which he stated that he inspects the roof to make sure it is in a safe and clean condition at least once a month, but admittedly testified that he last inspected the roof of the premises a couple of weeks prior to the incident on September 27, 2014. Plaintiffs emphasize that because Klaric had not checked the roof in several weeks prior to the incident in question, defendant has no way of knowing with certainty the condition of the rooftop at the time plaintiff sustained his injuries. Importantly, plaintiffs also point out, defendant's own witness, Klaric, testified that from time to time he would make roof repairs on the same roof in question thereby conceivably raising a question of fact as to the existence of residual roofing materials or debris at the premises on the roof in question. Klaric also testified that Nathan Fishman, the owner of

Seaman Arms, had discussed with him about having a new roof put on 72 Seaman which plaintiffs surmise is evidence that defendant was considering the installation of a new roof. Plaintiff argues that Klaric's testimony underscores the existence of factual questions as to whether the roofing repair materials which caused his fall were put there by the defendant and/or an agent/employee of defendant.

Further, plaintiffs maintain that GML § 205-a, which creates a cause of action for firefighters who suffer line-of-duty injuries directly or indirectly caused by a defendant's violation of relevant statutes, regulations, and ordinances, applies here. Plaintiffs argue that the provision is broadly construed, so a firefighter need only show a "reasonable connection" between the violation and his injuries. As to defendant's arguments regarding lack of notice of the causative defect, plaintiffs aver that not only did defendant have notice of the roofing material on their roof, but defendant actually left the materials from a prior repair. Again, plaintiffs rely on Klaric's testimony as proof that defendant failed to ensure that its rooftop was kept free from all debris at all times in contravention of New York City Housing Maintenance Code, subchapter 2, Article II, § 27-2010, New York State Multiple Dwelling Law § 78(1), and New York City Administrative Code § 28-301.1 (2014).

Discussion

On a motion for summary judgment, the moving party has the initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1985]). The facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

Once the moving party "produces the requisite evidence, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40, 49 [2015]). The court's task in deciding a summary judgment motion is to determine whether there is bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp*, 18 NY3d 499, 505 [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 Due Quebec, Ltee*, 297 AD2d 528, 528-529 [1st Dept 2002]).

It is well established that an owner of a premises has a duty to keep its property in a "reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury" (*Macey v Truman*, 70 NY2d 918, 919 [1987]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). For a defendant to prevail in a premises liability case, it must not only set forth a prima facie case but must establish, conclusively, "that it neither created the alleged defective condition nor had actual or constructive notice of its existence" (*Kyte v Mid-Hudson Wendico*, 131 AD3d 452, 453 [2d Dept 2015]). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Section 11-106 (1) of New York's General Obligations Law "permits a right of action for firefighters … injured in the course of their duties by the negligence or intentional conduct of persons other than their employers or coemployees" (*Grogan v City of New York*, 259 AD2d 240, 242 [1st Dept 1999]).

By contrast, General Municipal Law § 205-a provides protection to a firefighter injured as a result of a building code violation that "enlarges the hazard of his task by diminishing fire safety

or prevention" (*Meyer v Moreno*, 258 AD2d 315, 316 [1st Dept 1999]). To make out a valid claim, a plaintiff firefighter must identify the statute or ordinance that defendant violated, describe the manner in which he was injured, and set forth relevant facts from which it may be inferred that the defendant's negligence directly or indirectly caused him harm (*Zvinys v Richfield Inv., Co.*, 25 AD3d 358 [1st Dept 2006], *quoting Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 441 [1995]). While a plaintiff need only establish a practical or reasonable connection between the statutory or regulatory violation and the claimed injury (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]), the causation element will not be found where the connection is too speculative to support GML 205-a liability (*see e.g. Downey v Beatrice Epstein Family Partnership, L.P.*, 48 AD3d 616 [2d Dept 2008]; *Zvinys*, 25 AD3d at 359; *Kenavan v City of New York*, 267 AD2d 353, 356 [2d Dept 1999]). "On a motion for summary judgment to dismiss a section 205-a claim, the defendant bears the initial burden of showing either that it did not negligently violate any relevant government provision, or if it did, that the violation did not directly or indirectly cause the plaintiff's injuries. Only if the defendant sustains this burden must the plaintiff raise a triable issue of fact as to whether the alleged code violations directly or indirectly caused his injuries" (*Zvinys*, 23 AD3d at 359; *Giuffrida,* 100 NY2d at 81).

Here, plaintiffs have alleged that defendant violated provisions of the Administrative Code, including New York City Housing Maintenance Code, subchapter 2, Article II, § 27-2010. Section 27-2010 provides that: "[t]he owner of a dwelling containing two or more dwelling units… shall keep the roof, yard, courts, and other open spaces free from dirt, filth, garbage or other offensive material."

Plaintiff also claims violations of the New York State Multiple Dwelling Law § 78 (1), which provides: "[e]very multiple dwelling, including its roof or roofs, and every part thereof and

the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section."

In addition, plaintiffs allege violations of NYC Administrative Code § 28-301.1 (2014) which states in relevant part "[a]ll buildings and all parts thereof and all other structures shall be maintained in a safe condition ... The owner shall be responsible at all times to maintain the building and its facilities, and all other structures regulated by this code in a safe and code-complaint manner and shall comply with the inspection and maintenance requirements of this chapter."

Defendant's motion for summary judgment must be denied. Here, the bulk of defendant's motion hinges on its contention that plaintiffs cannot establish causation because plaintiff's testimony is insufficiently specific and invites speculation. After reviewing that testimony, however, this Court disagrees. The Court notes that plaintiff did repeatedly testify that he initially did not know what he tripped over and did not see any roofing material on the roof when he first got up there. However, plaintiff's subsequent testimony set forth with specificity the items he fell on including the approximate size of the broken-up wood boards that he tripped over. Likewise, plaintiff described in detail how he fell backwards when he stepped on the uneven piles of debris which he later clarified was roofing repair materials. While defendant emphasizes it is pure speculation to assume that plaintiff actually tripped over the specific debris he did not see until later, as opposed to debris that actually was produced by the fire or firefighting activities, plaintiff's testimony contradicts this position.

A plaintiff is not required to recall the exact manner in which the fall occurred (*Cuevas v City of New York*, 32 AD3d 372, 372-373 [1st Dept 2006] ["As it was not [plaintiff's] obligation to prove his claim to defeat the motion for summary judgment, he was entitled to a reasonable

inference]). Rather, plaintiff must identify the defect enough for a trier of fact to find, based on logical inferences, not speculation, that the defect proximately caused the accident (*Cherry v Daytop Vil. Inc.*, 41 AD3d 130, 131 [1st Dept 2007]; *Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006]). Although plaintiff admitted that he did not see any roofing material on the roof before the accident, when asked why he fell, he testified that his momentum threw him backwards, and he stepped on uneven debris that caused him to lose his footing, which he later observed to be a pile of roofing materials akin to the kind used in prior repair. That is enough evidence of a defect to withstand the instant motion for summary judgment. The parties' disputes over whether plaintiff tripped on roofing material left from a prior repair, as he testified, or on the roofing debris that plaintiff pulled from the roof, raise factual issues not amenable to resolution on a motion for summary judgment (*Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500, 501 [1st Dept 2011]). Plaintiff is entitled to a reasonable inference that he tripped on roofing repair material (*see Cuevas*, 32 AD3d at 373) and it would be reasonable for the evidence to lead a trier of fact to conclude that the roofing material he tripped on was not debris created by the FDNY and that said roofing material is a dangerous condition (*see Yoon Peng Choo v Fielder Cos. Inc.*, 123 AD3d 529, 530-531 [1st Dept 2014] [finding that plaintiff sufficiently identified the cause of her fall, although she did not see it before the accident]; *Figueroa v City of New York*, 126 AD3d 438, 440 [1st Dept 2015] [testimony not speculative when plaintiff could not pinpoint the exact location of her fall in photographs and later clarified upon further questioning]).

Moreover, defendant failed to meet its prima facie burden of showing that it lacked constructive notice. Klaric testified that he would inspect the roof at least once a month but kept no written log of these inspections. When asked if he remembered the last time he was on the roof prior to September 27, 2014, Klaric stated "I cannot recall exactly the date, but like I said

previously, I am going on the roof every couple of weeks" (defendant's exhibit C at 34-35). This vague testimony is insufficient to show the absence of constructive notice because it fails to establish "specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2001]).

Inasmuch as defendant fails to make a prima facie showing on any of its arguments regarding plaintiffs' common law negligence claim, the same can be said for their claims under General Obligations Law § 11-106. Likewise, the Court does not reach the merits of plaintiffs' claims under General Obligation Law § 205-a as defendant's argument was contingent upon the Court agreeing with its position that affirmative evidence shows that plaintiffs cannot establish the cause of the accident without speculation.

In sum, the parties' deposition testimony was conflicting and reveals a factual dispute as to how and why the accident occurred and whether or not defendant had notice of the defective condition. Here, defendant failed to eliminate all triable issues of fact. Since the defendants failed to meet their prima facie burden, we need not consider the sufficiency of the plaintiffs' opposition papers.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

This constitutes the decision and order of this Court.

Dated: September 12, 2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.