

Hawkins v New York City Hous. Auth.
2019 NY Slip Op 33776(U)
December 20, 2019
Supreme Court, New York County
Docket Number: 155192/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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BEVERLY HAWKINS,

Index No. 155192/2016

Plaintiff

- against -

DECISION AND ORDER

NEW YORK CITY HOUSING AUTHORITY,

Defendant
-----X

LUCY BILLINGS, J.S.C.:

Plaintiff sues for injury to her finger on her right hand November 9, 2015, when she attempted to pull open a door exiting defendant's management office for its housing development at 250 Madison Street, New York County, and the old, heavy, steel door stuck shut. She pulled on the door handle and did not turn the door knob. Defendant moves for summary judgment dismissing the complaint. C.P.L.R. § 3212(b).

I. DEFENDANT'S PRIMA FACIE DEFENSE

Gail Farquharson testified at her deposition that she worked in the management office, was there when plaintiff was injured, regularly assisted residents of the housing development like plaintiff who visited the office, and sent orders for repairs to defendant's maintenance department. Therefore she used the door regularly and was familiar with caretakers checking the door daily to ensure access to and egress from the office and with any orders to repair the door. Farquharson testified that she never received any complaints about opening the door or encountered any

difficulty herself opening the door, but when exiting the office it was necessary to turn the door knob to open the door.

Patrick Credle testified at his deposition that he was defendant's janitorial caretaker at 250 Madison Street in November 2015 and before then. He, too, used the door regularly and never received any complaints about opening the door or encountered any difficulty himself opening the door, but he was unfamiliar with any maintenance or repairs of the door.

Maintenance worker Cecilio Guzman, however, inspected the door approximately five months before plaintiff's injury pursuant to a work order generated in response to a report that the key in the lock to the door was not functioning. He testified at his deposition that the key cylinder needed repinning, but the need for this repair did not impair the functioning of the door, which opened easily, without extraordinary pressure when unlocked. The evidence does not reveal whether any subsequent repair was effected to the key cylinder that may have affected the opening of the door.

Defendant also presents the affidavit of an engineer who inspected the door January 15, 2019, but absent any evidence that the door was in the same condition then as it was November 9, 2015, this affidavit is useless except to the extent that the engineer comments on other first hand witnesses' testimony.

Serrano v. TED Gen. Contr., 157 A.D.3d 474, 474 (1st Dep't 2018);

Santana v. New York York City Hous. Auth., 128 A.D.3d 564, 565

(1st Dep't 2015); Green v. Gracie Muse Rest. Corp., 105 A.D.3d

578, 579 (1st Dep't 2013); Alston v. Zabar's & Co., Inc., 92 A.D.3d 553, 553 (1st Dep't 2012). Nevertheless, defendant's maintenance worker thoroughly inspected the door and door frame five months before plaintiff's injury and defendant's two other employees, both with responsibilities to report or initiate building repairs whenever needed, used the door daily during the five months leading up to plaintiff's injury. They all establish that, even if the door stuck shut November 9, 2015, defendant received no prior actual or constructive notice of such a condition. Rivera v. 2160 Realty Co., L.L.C., 4 N.Y.3d 837, 838 (2005); Rosario v. Prana Nine Props., LLC, 143 A.D.3d 409, 410 (1st Dep't 2016); Alamo v. New York City Hous. Auth., 118 A.D.3d 484, 484 (1st Dep't 2014); Issing v. Madison Sq. Garden Ctr., Inc., 116 A.D.3d 595, 595 (1st Dep't 2014).

II. PLAINTIFF'S REBUTTAL

Plaintiff's engineer Richard Berkenfeld inspected the door and door frame within two weeks after plaintiff's injury and found the frame bent, the strike on the frame bent and askew, the lock mechanism askew and protruding from the face of the door, the screws for the top door hinge missing, and the other hinge attachments causing the door to be out of alignment. All these conditions caused the door to be stuck in its frame and to require two hands and his full weight to open the door. He nevertheless opened the door without turning the door knob. The conditions that Berkenfeld found are unlikely to have all developed only within the preceding two weeks.

When Berkenfeld arrived at the door, he found it propped open with a door stop, which he removed to allow the door to close and then for him to open it. Were the court to consider Berkenfeld's report, the court reasonably might infer that the door was propped open as a consequence of the door's malfunctioning condition. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016).

While Berkenfeld's report of his inspection and resulting findings would rebut defendant's prima facie defense that defendant lacked any notice of a malfunctioning door, the court may not consider his report and findings because they are unsworn. Glueck v. Starbuck's Corp., 173 A.D.3d 450, 451 (1st Dep't 2019); Ulm I Holding Corp.. v. Antell, 155 A.D.3d 585, 586 (1st Dep't 2017); Rickert v. Diaz, 112 A.D.3d 451, 452 (1st Dep't 2013); Migliaccio v. Miruku, 56 A.D.3d 393, 394 (1st Dep't 2008). See O'Connor v. Restani Constr. Corp., 137 A.D.3d 672, 673 (1st Dep't 2016); Accardo v. Metro-North R.R., 103 A.D.3d 589, 589 (1st Dep't 2013); Frees v. Frank & Walter Eberhart L.P. No. 1, 71 A.D.3d 491, 492 (1st Dep't 2010). At oral argument, plaintiff's attorney explained that Berkenfeld had died between November 2015 and defendant's motion in April 2019. Plaintiff provides no explanation, however, why his report was not sworn before he died or why plaintiff did not retain another expert to inspect the door accompanied by plaintiff or another witness competent to attest that the door's condition was comparable to its condition in November 2015. Ulm I Holding Corp.. v. Antell, 155 A.D.3d at

586; Tejada v. Six Ten Mgt. Corp., 15 A.D.3d 265, 266 (1st Dep't 2005); Oddo v. Edo Mar. Air, 34 A.D.3d 774, 775 (2d Dep't 2006). The report is accompanied by a certification that the report is from Berkenfeld's former office, but the certification does not include the elements of the business record exception to the rule against hearsay. Suppiah v. Kalish, 76 A.D.3d 829, 832 (1st Dep't 2010). See People v. Ramos, 13 N.Y.3d 914, 915 (2010); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015). Such a report, prepared for this litigation, would not qualify as a business record in any event. Rickert v. Diaz, 112 A.D.3d at 452; Frees v. Frank & Walter Eberhart L.P. No. 1, 71 A.D.3d at 492.

III. CONCLUSION

Without Berkenfeld's report, plaintiff's deposition testimony that the door was old and heavy does not demonstrate that it was a hazard or in disrepair or that such a condition had developed before plaintiff used the door November 9, 2015. Therefore the court grants defendant's motion for summary judgment dismissing the complaint. C.P.L.R. § 3212(b).

DATED: December 20, 2019



LUCY BILLINGS, J.S.C.

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J.S.C.