

Graham v 702 Rockaway Ave. LLC
2019 NY Slip Op 34610(U)
March 29, 2019
Supreme Court, Nassau County
Docket Number: Index No. 605760/17
Judge: Jack L. Libert
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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

MEGAN GRAHAM,

Plaintiff,

-against-

702 ROCKAWAY AVENUE LLC,

Defendant.

TRIAL PART 23
NASSAU COUNTY

MOTION # 02
INDEX # 605760/17
MOTION SUBMITTED:
JANUARY 4, 2019

MD

The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1**
- Cross Motion/Answering Affidavits.....2**
- Reply Affidavits.....3**
- Memorandum of Law.....4**

Defendant moves pursuant to CPLR 3212 for summary judgment.

Plaintiff seeks damages for personal injuries allegedly sustained when she slipped, tripped or fell on a staircase inside of a residential apartment building located at 702 Rockaway Avenue, Brooklyn, New York. Defendant property owner argues that dismissal of the complaint is warranted because defendant did not cause or have actual or constructive notice of the dangerous or defective condition.

Plaintiff testified at her deposition as follows. She was employed by the New York Police Department as a police officer for approximately three years. On July 5, 2016, at approximately 11:45 PM, plaintiff allegedly suffered a line of duty injury when she was responding to a call at 702 Rockaway Avenue, regarding a dispute with a knife. The complainant gave plaintiff and her partner access to the building. When plaintiff entered the building she noticed that some of the lights were out, including the light over the staircase. Although the light was dim, she saw the lobby and the stairs. She had a flashlight on her gun belt, but did not use it. There were approximately 10 stairs leading up to the landing between the lobby and the second floor. Plaintiff reached the landing using the hand rail located on the left side of the stairs. When plaintiff placed her right foot on the landing, she slipped on multiple pieces of mail and other debris. She

did not fall to the ground, but caught herself on the railing, causing her body to shift toward the left and her right foot to go out toward the right. Plaintiff continued up to the second floor, resolved the knife situation, and left within twenty minutes of the incident. At the end of her shift at 5:00AM the following morning, she had difficulty exiting the patrol car due to pain in her right knee. She stopped at the precinct and then went to the hospital.

Andre Smith, the superintendent of the building testified on behalf of defendant. The building is a residential apartment building that consists of four floors including a basement, ground floor lobby, and three floors with six apartment units on each. There is no elevator. There is an interior staircase which is separated by landings between each floor. Smith lives in the building and is responsible for cleaning and maintenance of the building. His regular schedule consisted of waking up at 4:00-5:00 a.m., maintaining the garbage in the backyard, and then sweeping and mopping the staircase from the top of the stairs to the lobby. He inspects the building throughout the day and cleans up any debris. He checks the lights daily and replaces any bulbs that were out. The building manager inspects the building each day from Monday through Thursday. On July 5, 2016, Smith performed his regular cleaning and maintenance of the building. The mail is delivered and placed on the windowsill at the second floor landing of the staircase. Smith asked the mailman to put the mail in the mailboxes located in the back of the lobby near the back door, but the mailman refused to do so because of garbage building up in the mailroom. Squatters and drug users and drug dealers occupy the building according to Smith. He testified that "sometimes these people get angry at whatever drugs they are on, sometimes they would be, call it, tripping and they would throw the mail." Smith occasionally observed mail on the floor of the landing. He was not aware of anyone slipping on the mail and was also unaware of any other lawsuits involving the subject staircase. He was also unaware of any complaints involving the subject staircase. However, tenants did complain about dirt and debris in the building. Smith testified that even if he cleaned the dirt and debris "they will come dirty it right away and complain about it."

Defendants Contentions

Defendant contends that it is entitled to summary judgment because it had no actual or constructive notice of the alleged condition. Further, defendant argues that it had no duty to warn plaintiff of an open and obvious condition. Defendant argues that the plaintiff had ample opportunity to use her flashlight to

illuminate the staircase, and she chose not do so. Defendant asserts that even in dim lighting, fifteen to twenty pieces of mail on the floor is a condition that is readily observable by a reasonable use of plaintiff's senses and that mail on the floor is not an inherently dangerous condition. In light of these facts defendant contends it had no duty to warn of the condition and did not breach its duty to maintain its property in a reasonably safe condition.

General Municipal Law (GML) 205-e is designed to provide an additional cause of action on behalf of a police officer who is injured in the line of duty, "either directly or indirectly, as a result of the neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town of city governments..." In order to establish a GML 205-e claim, an injured officer must "(1) identify the statute or ordinance with which the defendant failed to comply, (2), describe the manner in which the police officer was injured, and (3) set forth those facts which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the police officer."

The statutes at issue in this case are alleged violations of sections **28-301.1** of the New York City Administrative Code and Sections **52** and **78** of the Multiple Dwelling Law.

New York City Administrative Code section 28-301.1 is entitled: "Owner's Responsibilities." It states:

All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition. Whenever persons engaged in building operations have reason to believe in the course of such operations that any building or other structure is dangerous or unsafe, such person shall forthwith report such belief in writing to the department. 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-compliant manner and shall comply with the inspection and maintenance requirements of this chapter.

Multiple Dwelling Law §52 is entitled "Stairs and Multiple Dwellings Law"; Section 78 is entitled "Repairs." Defendant contends these two sections of MDL do not apply. Defendant cited to *Johnson v. Wythe Place, LLC*, 2014 NY Misc Lexis 3585. In that case the court held that MDL §78 may not serve as

a predicate to a GML §205-e cause of action because the defendant never received notice of a defective condition on the stairs and the stairs were kept in good repair. In the instant case defendant argues, it likewise never received notice of the alleged defective condition and the stairs were in good repair.

Plaintiff's Contentions

Plaintiff argues that the defendant failed to meet its burden of proof because it has not addressed the testimony of its own witness Smith regarding prior notice of the hazards alleged. Plaintiff also argues that an issue of fact exists regarding whether the defendant had notice of a recurring dangerous condition of dirt, mud, water and yellow substances at the location where the plaintiff fell. Plaintiff states that assuming *arguendo* defendant met its initial burden, the evidence in this case is sufficient to establish that the defendant had actual and/or constructive knowledge of a “recurring dangerous condition” of the presence of dirt and mail envelopes at the location where the plaintiff fell. Plaintiff cites to *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, 106–07, 650 N.Y.S.2d 717 (1996), which held in pertinent part:

It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233, 241; *Karamarios v Bernstein Mgt. Corp.*, 204 AD2d 139). This duty is, of course, tempered, as defendants point out, by the necessity that a party, as a prerequisite for recovering damages, must establish that the landlord created or had either actual or constructive notice of the hazardous condition that precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838), and by the rule that, “[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owner's] employees to discover and remedy it” (*supra*, at 837).

While this burden is a significant one, it is clear that, contrary to defendant's contention, plaintiff may satisfy it by evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord (*see, Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294; *Padula v Big V Supermarkets*, 173 AD2d 1094).

Further, plaintiff argues that the frequent existence of debris on the steps and landing is sufficient to raise an issue of fact regarding whether the defendant had constructive notice of the dangerous and defective conditions. This contention is further supported by Smith's testimony that due to the actions of

squatters and undesirable tenants, that the building required constant cleaning. Lastly, plaintiff contends that a GML 205-e claim may be premised upon an alleged violation of Multiple Dwelling Law Sections 78 and 52(1) and Section 28-301.1 of the New York City Administrative Code and the defendant has not established *prima facie* that it did not acquire notice of the hazards at issue under the diminished burden applicable to a GML Section 205-e.

DISCUSSION

A landowner has a duty to maintain its 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” (*Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 [internal quotation marks omitted]; see *Kellman v. 45 Tiemann Assoc.*, 87 N.Y.2d 871, 872, 638 N.Y.S.2d 937, 662 N.E.2d 255; *Behrens v. North Merrick Fruits, Inc.*, 148 A.D.3d 972, 973, 50 N.Y.S.3d 161). “In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence” (*Lezama v. 34–15 Parsons Blvd, LLC*, 16 A.D.3d 560, 560, 792 N.Y.S.2d 123; see *Barretta v. Glen Cove Prop., LLC*, 148 A.D.3d 1100, 1101, 50 N.Y.S.3d 520; *Behrens v. North Merrick Fruits, Inc.*, 148 A.D.3d at 973, 50 N.Y.S.3d 161). A defendant has constructive notice of a defect when the defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (see *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774; *Rubin v. Cryder House*, 39 A.D.3d 840, 840, 834 N.Y.S.2d 316).

In moving for summary judgment, a defendant property owner has the initial burden of making a *prima facie* showing that it neither created an allegedly dangerous or defective condition nor had actual or constructive notice of its existence (see *Behrens v. North Merrick Fruits, Inc.*, 148 A.D.3d at 973, 50 N.Y.S.3d 161; *Arzola v. Boston Props. Ltd. Partnership*, 63 A.D.3d 655, 656, 880 N.Y.S.2d 352).

An issue of fact exists regarding whether defendant had notice of the dangerous condition at the location where plaintiff slipped. Plaintiff established that the subject incident in the stairwell of the building owned by defendants was caused by accumulation of debris and mail on the floor which was frequently present. Tenants complained frequently about the garbage and debris. Smith testified that he would see mail

on the floor throughout the day. He testified that the mail carrier refused to use the designated mailroom because tenants or squatters would leave garbage there and “you couldn’t like, step on a mountain of garbage to open a mailbox. So he used to put it on the landing...”

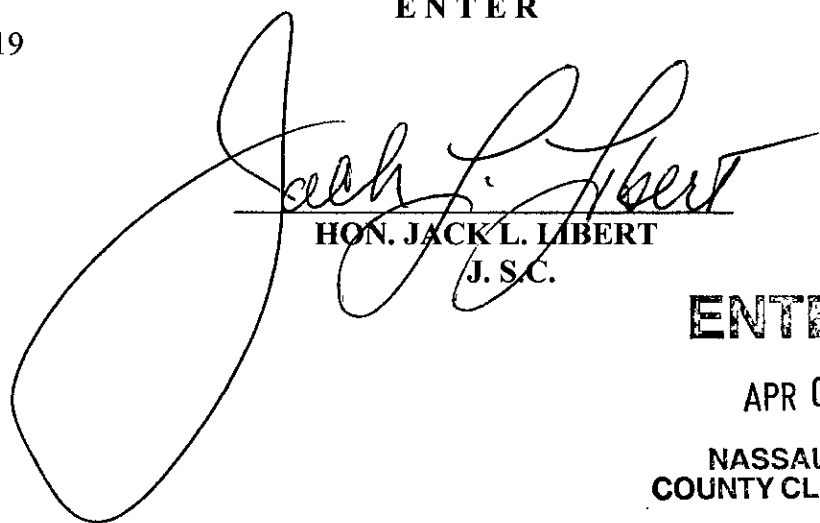
Issues of fact exist as to the condition of the stairwell. Plaintiff satisfied its burden by providing evidence of an ongoing and recurring dangerous condition (*see O’Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, *citing Colt v. Great Atlantic & Pacific Tea Co.*, 209 AD2d 294; *Padula v. Big V. Supermarkets*, 173 AD2d 1094). Smith’s testimony that dirt and debris accumulation was a constant problem as was the mail occasionally scattered on the steps raises another issue of fact. In light of these issues of fact defendants other arguments are moot.

Based on the reasons stated above, defendant’s motion is **denied**.

This constitutes the decision and order of the court.

ENTER

DATED: March 29, 2019


HON. JACK L. LIBERT
J. S.C.

ENTERED

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