Acevedo v Village/Town of Mount Kisco
2019 NY Slip Op 34791(U)
February 25, 2019
Supreme Court, Westchester County
Docket Number: Index No. 65806/2016
Judge: Lawrence H. Ecker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

LINDA ACEVEDO and CHARLES ACEVEDO,

Plaintiffs,

-against

Index No. 65806/2016
DECISION/ORDER
Motion Date: 12/12/18
Motion Seqs. 2, 3

VILLAGE/TOWN OF MOUNT KISCO, THE MOUNT KISCO HOUSING AUTHORITY and MARCH CONSTRUCTION INC.,

Defendants.

ECKER, J.

The following papers were read on the motion of MARCH CONSTRUCTION INC. ("March") [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint and cross-claims as against LINDA ACEVEDO ("plaintiff") and CHARLES ACEVEDO ("Charles")[1], and the motion of THE MOUNT KISCO HOUSING AUTHORITY ("the Authority") [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing plaintiff's complaint and March's cross-claim for indemnity against it:

PAPERS
Mot. Seq. 2(March)
Notice of Motion, Affidavits (2), and Exhibits A-Q
Affirmation in Opposition (plaintiff) and Exhibits A-C [2]
Affirmation in Opposition (the Authority)
Affirmation in Reply

Mot. Seq. 3 (the Authority)
Notice of Motion, Affirmation in Support, Memorandum of Law and Exhibits A-J

---

[1] By decision dated November 30, 2017, Charles' complaint as against the Authority was dismissed based on his failure to file a Notice of Claim. [NYSCEF No. 40]. In addition, the parties entered into a stipulation discontinuing all claims and cross-claims against the Village/Town of Mount Kisco in this action on February 10, 2017. [NYSCEF Nos. 19, 20].

[2] Court rules direct plaintiff to use numbered exhibit tabs.

Affidavit in Opposition (plaintiff) and Exhibits A-C
Reply Affidavit and Affidavit of Expert

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges that on January 31, 2016, at or about 8:30 p.m., she slipped and fell on exterior, covered stairs ("the stairs"), suffering injury, in an apartment building owned by the Authority ("the Building"). At the time of her fall, she was leaving her husband Charles' apartment in the company of her daughter Alexis Acevedo. Plaintiff and Alexis had ascended the stairs earlier in the day without incident. When the two women left Charles' apartment, Alexis descended the stairs in front of plaintiff without any difficulty. Plaintiff claims that she was descending the stairs behind Alexis when she fell. Charles asserts a derivative claim for his alleged damages as against March.

On April 14, 2016, plaintiffs' attorney served a Notice of Claim on Mount Kisco ("the Notice"). [NYSCEF No. 52]. The Notice set forth the date, time and place of the occurrence. In relevant part, the Notice states that plaintiff "slipped and fell" on the outdoor staircase and the "subject dangerous and defective staircase is depicted" in the attached photographs. Plaintiffs allege that the fall was due to the "carelessness, recklessness and negligence" of defendant in the "operation, maintenance, control, supervision, inspection and repair of the . . . location."

Plaintiff, Charles and Alexis gave depositions. In their depositions, plaintiff's fall is described as having occurred while she was holding onto the bannister on the right side of the staircase, her right foot slipped on the second tread above the landing adjacent to Charles' apartment. Plaintiff fell two steps and landed on the next landing. None of the witnesses was able to describe a particular condition on the stairs that caused the fall.

Plaintiff testified that her foot slipped as she was holding onto the railing, mentions a mis-step, and states "the stairs looked shiny and like wet, glassy like, so I skipped the last step, and fell." [Plaintiff's Transcript p.22]. Plaintiff testified that she assumed that the steps were wet because they were shiny and "not dry looking" and were wet from snow blowing onto the steps. Plaintiff admitted, however, that she did not see any snow or rain on the steps. [Plaintiff's Transcript p.103].

Charles testified that he did not see which step plaintiff fell on. He claimed the steps were wet at the time of her fall. [Charles Transcript pp.34-37]. At another point, he testified that, while the steps were often wet, but he did not know why plaintiff fell. [Charles Transcript p. 63]. Alexis testified the stairway was dark and looked to be wet.

In support of her claim, plaintiff submits the 3101(d) disclosure and report of William Marletta, Ph.D., CSP, who opines, as to the condition of the stairway, that it was inherently unsafe, thus being the proximate cause of plaintiff's fall. Specifically, he opines that: surface conditions lead to "gait adjustments" that may cause a fall; the

relevant tread nosing blending was difficult to see; a violation of New York Building Code existed; the steps could have been made safer with visual cues; the steps were not slip resistant; and the handrails were improper. In addition, he opined that the lighting was inadequate, and warning signs were necessary. [NYSCEF No.98].

In support of its motion to dismiss, the Authority argues that: the Notice is deficient and a nullity; plaintiff is unable to identify the condition that caused her to trip; and the lighting conditions were not the proximate cause of the fall. The Authority also submits an expert affirmation that refutes the opinion of plaintiff's expert.

In support of its motion to dismiss, March asserts that: it owed no duty to plaintiff; plaintiff is unable to identify the cause of the fall; it did nothing relative to its service contract with the Authority that can form a basis for liability; and the indemnification provisions of the contract between it and the Authority, as permitted by statute, indemnifies each to the other, as a result of the negligence of the indemnitor, not the indemnitee.

The Notice of Claim

The Notice is required to be filed pursuant to Public Housing Law §157(2), as governed by General Municipal Law § 50-e. On its motion, the Authority maintains that the Notice is legally inadequate because it lacks detail as to the cause of the fall. Plaintiff did not respond to this argument in its opposition to the motion. [3]

"The test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate" (*Ingrao v New York City Transit Authority,* 161 AD3d 683 [1st Dept 2018]). A review of the Notice reveals that it sets forth the date, time, specific location, and includes seven photographs depicting the stairway. It also includes the allegations that plaintiff's fall was due to defendant's carelessness, recklessness and negligence of relative to the ownership, operation, maintenance, control, supervision, inspection and repair of the aforesaid location. Under the circumstances, the Authority received sufficient information to investigate plaintiff's claims.

In any event, the parties have not advised the court as to whether a GML §50-h hearing was conducted. It is evident, however, that following the commencement of this action, the parties engaged in substantial pre-Note of Issue disclosure, depositions, expert exchange, and service of bills of particulars.

In *D'Alessandro v New York City Transit Authority*, 83 NY2d 891 [1994], the Court reversed to lower courts and re-instated the complaint. The motion to dismiss,

---

[3] The Authority argues that the failure of plaintiff to argue this point constitutes a concession. Nevertheless, the court elects to address the issue on the merits.

predicated upon the claim that the notice of claim was deficient, was made after jury selection. In its holding, the Court stated:

> "In determining whether to grant the motion to dismiss the complaint, the courts below erroneously concluded that their inquiry was strictly limited to the 'four corners' of the notice of claim . . . In passing on the sufficiency of a notice of claim in the context of a motion to dismiss, courts are not confined to the notice of claim itself. The relevant inquiry is set forth in General Municipal Law § 50-e (6), which provides that 'a mistake, omission, irregularity or defect made in good faith . . . may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.' In making this determination of prejudice, the court may look to evidence adduced at a section 50-h hearing, and to such other evidence as is properly before the court."

Applying these principles to the facts presented here, the issue of the adequacy of the Notice is irrelevant, as there is no evidence that the Authority suffered prejudice as the result of any alleged deficiencies in the Notice. In this action, the size and the content of the record, as to which the Authority, at all times, has been an active participant, constitutes "such other evidence as is properly before the court." In light of the record, any deficiency in the Notice as to causation is moot as a result of the extensive discovery proceedings that have transpired during the course of this litigation. Of note, the defendant did not submit any evidence demonstrating that it was misled by any deficiency, or that it conducted an investigation at the wrong location (*Ruark v City of Glen Cove,* 164 AD3d 1492 [2d Dept 2018]). Accordingly, that part of the Authority's motion to dismiss based on the alleged inadequacy of the Notice is denied (*See Puello v New York City Housing Authority*, 150 AD3d 1164 [2d Dept 2017]; *Power v Manhattan and Bronx Surface Operating Authority*, 16 AD3d 655 [2d Dept 2005]).

Motions for summary judgment

It is well-settled that the proponent of the 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 (*Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]; *De Souza v Empire Transit Mix, Inc.,* 155 AD3d 605 [2d Dept 2017]). Importantly, once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp., supra; Alvarex v Madeline D'Anthony Enterprises, Inc.v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]; *see De Souza v Empire Transit Mix, Inc., supra; Pinelawn Cemetery v Metropolitan Transp. Auth.,* 155 AD3d 1069 [2d Dept 2017]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of New York, supra; Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]*; Hammond v Smith,* 151 AD3d 1896 [4th Dept 2017]).

In *Andre v Pomeroy*, 35 NY2d 361, 364 (1974), moreover, the Court stated:

> "summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

In a slip- or trip-and-fall case, therefore, a defendant may establish its *prima facie* entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall (*Aristizabal v Kostakopoulos,* 159 AD3d 860 [2d Dept 2018]; *Amster v Kromer*, 150 AD3d 804 [2d Dept 2017]). Indeed, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*Aristizabal v Kostakopoulos, supra; Amster v Kromer, supra; Rivera v J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 827 [2d Dept 2014]). Proximate cause may be inferred from the facts and circumstances underlying the injury only when the evidence is sufficient to permit a finding based on logical inferences from the record and not upon speculation alone (*Thompson v Commack Multiplex Cinemas*, 83 AD3d 929 [2d Dept 2011]).

Here, defendants made a *prima facie* showing of their entitlement to judgment as a matter of law by submitting, *inter alia*, the plaintiff's deposition testimony, wherein she admitted that she did not know the cause of her accident, or what caused her to lose her balance and fall (*Amster v Kromer, supra*; *Thompson v Commack Multiplex Cinemas*, *supra*).

In opposition, plaintiff fails to generate a question of fact as to the issue (*Amster v Kromer, supra*; *Aistizabal v Kostakopoulos*, *supra; Burke v Umbaca,* 163 AD3d 618 [2d Dept 2018]). While plaintiff also testified at her deposition that the steps were shiny, and Charles testified at his deposition that it snowed and the steps were wet, a determination that this alleged defect was the proximate cause of the plaintiff's accident, rather than a misstep or loss of balance, would be speculative (*Rivera v Port Authority of New York and New Jersey,* 69 AD3d 917 [2d Dept 2010]; *Rodriguez v Cafaro*, 17 AD3d 658 [2d Dept 2005]).

In fact, a review of all of the testimony presented reveals that no one, including plaintiff, was able to identify what caused her to trip on the stairway, other than her own mis-step. The deposition of plaintiff's daughter and husband, who were present when the accident occurred, failed to raise a triable issue of fact, as the witnesses did not see what caused plaintiff to fall (*Rivera v J. Nazzaro Partnership, L.P., supra*). Certainly, plaintiff's effort to point the finger at the construction of the stairway, or its condition at the time in question, whether wet or dry, or the lighting conditions, are mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact as to negligence on the part of the Authority or March (*Rivera v J.*

Nazzaro Partnership, L.P., supra; Kloepfer v Aslanis, 106 AD3d 956 [2d Dept 2013]). Since the plaintiff did not know what caused her to fall, it would be speculative to assume that the alleged conditions proximately caused the fall (*Rivera v J. Nazzaro Partnership, L.P., supra; Kloepfer v Aslanis, supra*).

Moreover, in terms of plaintiffs' expert affirmation, under these circumstances, it would be speculative to conclude that any of the alleged statutory and building code violations or dangerous conditions set forth in the expert's affidavit, even if fully credited, proximately caused plaintiff's accident (*see Burns v Linden Street Realty, LLC*, 165 AD3d 876 [2d Dept 2018]; *Thompson v Commack Multiplex Cinemas*, *supra*). As such, although plaintiff submitted an expert affidavit from an engineer who asserted that the stairs violated provisions of the Building Code, plaintiff presented no evidence connecting these alleged violations to her fall. Thus, even assuming that an applicable code provision was violated, it would be speculative to assume that any such violation was a proximate cause of the accident (*Amster v Kromer*, *supra*). Similarly, that another person may have fallen at an earlier time on the same stairway does not lead to different conclusion.

As such, the court finds that the failure to identify the instrumentality that caused plaintiff to mis-step and then fall is fatal to her cause of action, thereby justifying the dismissal of the complaint, and cross-claims as against the Agency as a matter of law. (*See Winegrad v New York University Medical Center*, *supra; Zuckerman v City of New York, supra*).

Based on the same reasoning, since plaintiff has failed to establish the cause of her fall, there can be no liability ascribed to March. Consequently, it is unnecessary to analyze March's conduct under the standards for liability enunciated in *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]. In addition, the finding of no liability also makes moot the co-defendant's motion concerning the cross-claims for indemnification.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant THE MOUNT KISCO HOUSING AUTHORITY and the motion of defendant MARCH CONSTRUCTION INC., each made pursuant to CPLR 3212, for dismissal of the complaint and cross-claims, are granted, and the action is dismissed.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
February 23, 2019

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

To all parties appearing via NYSCEF