

**Mitchell v New York City Hous. Auth.**

2020 NY Slip Op 30048(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 156804/2017

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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KADIJA MITCHELL

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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INDEX NO. 156804/2017
MOTION DATE 07/03/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Plaintiff seeks to recover damages for personal injuries she sustained when she slipped and fell in a stairwell at defendant's building located at 217 West 63 Street on November 12, 2016, in the city, state, and county of New York. Defendant New York City Housing Authority moves pursuant to CPLR 3212 for summary dismissal of the complaint on the grounds that it had no notice of the alleged defect that caused plaintiff's fall. Plaintiff opposes the motion.

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (see Alvarez v Prospect Hosp, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see Zuckerman v City of New York, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (see Vega v Restani Constr. Corp, 18 NY3d 499 [2012]). 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 Haus. Corp, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's allegation is that as she was walking and pulling her one-year old daughter in a stroller down the stairs inside defendant's building known as the Amsterdam Houses at 3:00 a.m. on November 12, 2016, she slipped on a slippery substance on the second or third step of the second-floor staircase that caused her to fall. Plaintiff went to the building at 8:45 p.m. on November 11 to visit a friend who resided in the building. When she walked up the stairs to her friend's apartment,

plaintiff had not seen any liquid in the stairwell then. She did not see any liquid on her way down the stairs at 3:00 a.m. until after she fell (NYSCEF # 16 – Deft’s Aff in Support at 6-7). After falling, plaintiff noticed the smell of soda and alcohol, and the liquid substance that got on her clothing after her fall was brown, dirty, and warm. Plaintiff described the liquid substance as wet in the middle but seemed like it was drying, that it was spread out and dripping down the steps, and there were footprints (NYSCEF # 42 – Pltf’s opp, ¶ 13).

Defendant argues that there was no actual or constructive notice of the defective condition that caused plaintiff’s fall. In support of its motion, defendant submits the affidavit of its caretaker, Israel Ortiz, who averred that he inspected the premises before his shift ended on November 11. As November 11 was Veteran’s Day, a holiday, defendant’s staff had a shortened workday. Ortiz’s hours that day was from 8:00 a.m. to 1:00 p.m. Ortiz averred that there were no wet conditions in the stairwell when he left work that day.

In opposition, plaintiff contends that defendant created or had actual notice of the subject condition. Plaintiff also contends that there is no evidence suggesting that the stairway was inspected and that, even if it were, the inspection occurred in an unreasonable amount of time prior to plaintiff’s accident. Plaintiff takes issue with Ortiz’s affidavit that attempts to correct his testimony that he did not work on November 11. Plaintiff also argues that the court may not determine whether plaintiff saw the wet condition on the stairs the day prior to her accident, as she was not asked any foundational questions as to where she was looking when she was ascending the subject stairway.

In premises liability actions involving defective conditions, “[t]o establish a prima facie case, the plaintiff must show that the defendant either created a dangerous condition or had actual or constructive knowledge of the condition” (*Segretti v Shorestein Co., East, L.P.*, 256 AD2d 234, 235 [1st Dept 1998] [internal citations omitted]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). “To 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 defendant’s employees to discover and remedy it” (*Gordon*, 67 NY2d at 837).

Here, defendants make a *prima facie* showing that they did not have actual or constructive notice of the alleged condition that caused plaintiff to slip. Ortiz indicates that his janitorial duties from 8:00 a.m. to 10:00 a.m. on November 11, which consisted of, among other things, walking through the building, checking the subject stairway for hazardous conditions and cleaning any conditions that he encountered, including spillage, and that he does recall observing a slippery condition in the area where plaintiff’s accident took place in the early hours on November 12 (*id.* at ¶¶ 8-10). Ortiz indicated that after janitorial staff departed at 1:00 p.m. on November 11, the next staff would arrive at 8:30 a.m. the following day

(*id.* at ¶6). Defendants also submit the holiday and week-end janitorial schedule, wherein it states that from 10:15 a.m. to 11:00 a.m., Ortiz was required to “police assigned areas,” including the subject stairway (NYSCEF # 27).

While Ortiz deposition testimony conflicted with his affidavit as to whether he worked on November 11, this conflict was resolved through Andrew Harvin, another caretaker, who presented the Supervisor of Caretakers Logbook (Logbook) that showed Ortiz worked on November 11 (NYSCEF # 23 - Harvin tr at 31:12-17; 15:14-25; NYSCEF # 26 - Logbook). Further, Ortiz explains through his affidavit that he normally only works at the building every other weekend, and that on holidays he works pursuant to a weekend schedule. At the time of his deposition, Ortiz did not realize that November 11, 2016, a weekday, was Veterans Day, a holiday (NYSCEF # 25 – Ortiz aff at ¶¶2, 5). The Logbook refreshed his recollection as to whether he worked on November 11 (*id.*).

Accordingly, defendant meets its burden by submitting the caretaker’s description of his janitorial duties on the date prior to plaintiff’s accident, the janitorial schedule, and the Logbook indicating that the caretaker worked on November 11 (*see Pagan v New York City Hous. Auth.*, 121 AD3d 622, 623 [1st Dept 2014]; *Rodriguez v New York City Hous. Auth.*, 102 AD3d 407, 407 [1st Dept 2013]). While defendant is required to maintain the stairway in a reasonably safe condition, it is not required to inspect the stairway twenty-four hours a day (*Love v New York City Hous. Auth.*, 82 AD3d 588, 919 [1st Dept 2011]).

Plaintiff’s testimony of her accident does not raise an issue of fact to defeat defendant’s *prima facie* showing on its lack of notice. Plaintiff did not observe the dripping dark and dirty dripping substance on her way up the staircase at 8:45 p.m. (NYSCEF # 21 at 29:14-18). Thus, the liquid that caused plaintiff to slip and fall appeared on the subject stairs, at most, six hours prior to 3:00 a.m. – after the caretaker left the premises (*Rivera v 2160 Realty Co.*, 4 NY3d 837, 838 [2005]; *Pagan*, 121 AD3d at 623).

As to the plaintiff’s argument about the absence of foundation questions because she was not asked where she was looking as she was ascending the stairs, considering her answers that she did not notice any problem about the stairs, a foundation was laid. Plaintiff had to have looked at the stairs to answer questions as whether she noticed anything unusual in the stairwell, whether there was garbage on the stairs, and whether the steps were level (NYSCEF # 18 – Plt’s tr at 44-46).

Accordingly, it is hereby

ORDERED that defendant’s motion pursuant to CPLR 3212 for summary dismissal of plaintiff’s complaint is granted; the complaint is dismissed; it is further

ORDERED that defendant shall serve plaintiff a copy of this order with notice of entry within fourteen days of entry; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant New York City Housing Authority.

This constitutes the Decision and Order of the court.



1/06/2020

DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE