Gray v 1320 Fulton Ave. Mgt. Corp.
2020 NY Slip Op 31013(U)
March 16, 2020
Supreme Court, Bronx County
Docket Number: 20105/2018E
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

KEVIN GRAY,

Plaintiff,

-against-

1320 FULTON AVENUE MANAGEMENT CORP. and NEW YORK CITY MANAGEMENT LLC,

Defendants.

INDEX NUMBER: **20105/2018E**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **12/2/19**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion for summary judgment is denied for the reasons set forth herein.

The within action is for personal injuries arises from an accident on May 11, 2017 when plaintiff fell while climbing the interior stairs at 1320 Fulton Avenue, Bronx, New York. Plaintiff was a tenant of the apartment building which was owned by defendant 1320 Fulton Avenue Management Corp. ("1320 Fulton") and managed by defendant New York City Management LLC ("NYC Management). At the time, plaintiff was walking up the stairs between the second and third floors when he was caused to lose his grip on the handrail due to the handrail being loose and defective ultimately causing him to fall and be injured. Plaintiff testified that there were two separate sets of stairs between the floors, each with seven steps. At the time of the accident,

plaintiff was ascending the upper set of stairs. Plaintiff testified that as he walked up, he was holding a gallon of milk with his left hand and was holding on to the handrail on the right side of the staircase with his right hand. As he ascended the third and fourth step, the handrail jerked or popped and pinched his right hand causing him to lose hold of the handrail. Plaintiff testified that the handrail was loose and moved to the left and upwards exposing a nail which scratched his hand in addition to the pinching of his hand. Plaintiff lost his grip on the handrail and fell backwards down the staircase. Plaintiff testified that the subject handrail had been loose since he moved into the subject premises in 2004, and he complained to the landlord Carol Chung by phone, as well as complaining to the superintendent of the building, Robert Young.

Robert Young, the superintendent of the subject building, testified that he cleaned the entire apartment building on a daily basis. Prior to plaintiff's accident, he had not received any complaints regarding the subject handrail. He never experienced any problems using the handrail before plaintiff's accident. Mr. Young did not inspect the handrails, never wiped them down or cleaned them in any manner. He would usually grab the handrail when going up the stairs, but never specifically inspected them. After plaintiff's accident, he inspected the handrail and indicated that it seemed a little loose when he went to touch it. He further indicated that the screw connected to the metal bracket into the wooden post was slightly loose. Mr. Young tightened the screw and he used a liquid nail to attempt to remedy the looseness of the handrail. One or two days after plaintiff's accident, he spoke with the plaintiff in the lobby of the building who told him that he had fallen after his legs buckled and stated "I am telling you, Robert, it has nothing to do with the building. It was me, it was my leg, it always goes out."

In support of their motion for summary judgment, defendants submit the affidavit of Scott Silberman, P.E. who inspected the subject handrail. Mr. Silberman found no evidence that the handrail was defective when it was allegedly moved by plaintiff. He found that the handrail was properly mounted. In his investigation, the handrail moved only minimally and not excessively. Plaintiff has alleged that there should have been a second handrail, however, plaintiff was holding a gallon of milk in his left hand, so he would not have been able to use a handrail on the left side, had on existed. Mr. Silberman found that the handrail was properly mounted and there were no violations of statutes or codes.

Plaintiff submits the affidavit of Nicholas Belizzi, PE, in opposition to the motion. Contrary to Mr. Silberman's findings, Mr. Belizzi opines that plaintiff was not provided with the proper number of

handrails, and the existing handrail was at an improper height and was not properly maintained. Mr. Belizzi's examination of the connection of the subject wood handrail to the metal guard structure and support posts revealed that the bolts and nuts used to hold the handrail in place were found to be loose which caused the handrail to be unstable and to move when grasped. There were also some sharp edges in the handrail connection area which could scratch a person's skin when grasped. Mr. Belizzi opines that defendants violated Section 27-375 (f), Guards and handrails, of the New York City Building Code which pertains to interior stairs and provides that "[s]tairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only. Handrails shall provide a finger clearance of one and one-half inches, and shall project not more than three and one-half inches into the required stair width." Mr. Belizzi opines that plaintiff was not provided with the proper number of handrails and the existing handrail was at an improper height and was not properly maintained. The handrail was not properly, safely and adequately maintained and was loose with protruding sharp edges upon movement.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

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 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). 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 N.Y.2d 836, 837 (1986).

The motion for summary judgment is denied as the conflicting expert affidavits create issues of fact that must be decided by a jury. Defendants' expert's opinion regarding the lack of a second handrail is irrelevant because there is no evidence that plaintiff attempted to reach for the non-existent handrail and, in any event, plaintiff would not have been able to use it as he testified that he had a gallon of milk in his left hand as he was walking up the stairs. See, Raghu v. New York City Housing Authority, 897 N.Y.S.2d 436 (1st Dept. 2010)(Expert's claim of inadequacy of the handrail cannot avail plaintiff, inasmuch as her testimony was that she was not using the handrail at the time of the accident); Plowden v. Stevens Partners, LLC, 846 N.Y.S.2d 238 (2d Dept. 2007)(Defendant's motion for summary judgment granted where plaintiff failed to present any evidence connecting the absence of handrails to her fall and plaintiff did not allege that she reached out for a handrail either before or during her fall and did not testify at her deposition that the lack of handrail contributed to her accident). However, Mr. Belizzi's opinion regarding the alleged condition of the subject handrail when he inspected it raises an issue of fact as to whether it was in a defective or dangerous condition at the time of plaintiff's accident. Specifically, his investigation revealed that the bolts and nuts used to hold the handrail in place were loose which he opined caused the handrail to be unstable and to move when grasped. He also found that there were some sharp edges in the handrail connection area which could scratch a person's skin when grasped. This is consistent with plaintiff's testimony. Mr. Belizzi's inspection and description of the subject handrail raises an issue of fact as to whether it was in a defective condition at the time of plaintiff's accident.

Accordingly, defendants' motion for summary judgment is denied.

This constitutes the decision and Order of this Court.

Dated: March 16, 2020

A. Y. Tuitt

Hon. Alison Y. Tuitt