Batista v New York City Hous. Auth.
2020 NY Slip Op 31186(U)
May 5, 2020
Supreme Court, New York County
Docket Number: 160825/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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FRANCISCA BATISTA,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, NYCHA I HOUSING DEVELOPMENT FUND CORPORATION

Defendant.

---X

INDEX NO. 160825/2015

MOTION DATE 05/16/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action commenced by Francisca Batista, defendants New York City Housing Authority ("NYCHA") and NYCHA I Housing Development Fund Corporation ("HDF") (collectively "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After considering the positions of the parties, and after reviewing the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced this action on October 22, 2015 claiming that, on February 5, 2015, she slipped and fell in front of her apartment building located at

200 West 143rd Street in Manhattan due to the negligence of defendants in their ownership, operation and/or management of the premises. Doc. 1. Defendants joined issue by their answer, filed December 14, 2014, in which they denied all substantive allegations of wrongdoing and asserted several affirmative defenses. Doc. 4.

At a 50-h hearing conducted by the City of New York in June 2015, plaintiff testified, through a Spanish interpreter, that she was injured on February 5, 2015 at approximately 5 p.m. when she slipped and fell on snow on the sidewalk in front of her building as she was headed home. Doc. 40. She said that she crossed the street to go to her house and, after taking two or three steps on the sidewalk, she fell. Doc. 40. When asked if anything other than snow caused her to fall, she replied "[t]hat I know of, no." Doc. 40 at 20. She was not aware of any prior complaints about the area and did not know of anyone else falling there. Doc. 40 at 23-24. She did not remember whether it snowed on the date of the accident but said that there was a snowfall on the day before the accident. Doc. 40 at 17-20.

At a 50-h hearing conducted by NYCHA in July 2015, plaintiff again testified, through a Spanish interpreter, that on February 5, 2015, she slipped and fell on snow on the sidewalk in front of her building. Doc. 41 at 7-8, 25-26. She was unable to describe any of the characteristics of the snow she fell on and she was unaware of any witness to the accident. Doc. 41 at 10, 26. Nothing other than snow caused her

fall and she did not recall seeing any patches of ice when she stepped onto the curb in front of her building. Doc. 41 at 22, 26.

At her deposition in October 2016, plaintiff testified before a Spanish translator once again that, on February 5, 2015 at 5-5:30 p.m., she slipped and fell on snow on the sidewalk in front of her building. Doc. 42 at 11. She admitted that, when she crossed 143rd Street to go to her building, she did not cross inside of a crosswalk. Doc. 42 at 35-36. The last thing she saw before she fell was ice, which, she maintained, caused her to fall. Doc. 42 at 37, 41. However, she later equivocated, stating that she did not recall stepping on the ice, and, when asked whether she stepped on the ice she saw, said "[i]t must be". Doc. 42 at 47-50. She further testified that it may have been snow which caused her to fall. Doc. 42 at 52-53. When asked about the snow in the area of her fall, she could not describe its depth, color, or whether it was soft or hard. Doc. 42 at 50-52. Plaintiff admitted that pathways were cleared of snow in front of the building but could not provide any further detail about them and admitted that she was not on one of the cleared pathways when she fell. Doc. 42 at 42-43.

Carlos Romero, supervisor of grounds at plaintiff's building since 1994, appeared for deposition on behalf of the defendants. Doc. 43 at 8-10. In this role, he was responsible for maintenance of the grounds outside of plaintiff's building. Doc. 43 at 11. A caretaker shoveled the snow from the steps and ramps at the

entrance of the building, and Romero used a Bobcat with a snowplow attached to push snow from the sidewalks to the curb. Doc. 43 at 16. He did not know of any complaints made about a failure to clear snow on the grounds prior to plaintiff's accident. Doc. 43 at 24. Nor was he aware of any prior accidents involving someone slipping on snow. Doc. 43 at 24.

The note of issue was filed on October 19, 2019. Doc. 33.

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, they submit an attorney affirmation, a memorandum of law, the pleadings, the bill of particulars, 50-h and deposition transcripts, and an affidavit by Romero. Docs. 34-44. In his affidavit, Romero states, inter alia, that he performed visual inspections of the grounds every day at 8 a.m. and 4 p.m. in order to ascertain whether there were any dangerous conditions present; that he kept a snow removal and sanding log; and that the log reflects that no snow removal or "no snow removal operations were needed and that no icy conditions were present" on the date of the accident. Doc. 44.

In support of the motion, defendants argue that they did not have actual or constructive notice of the allegedly dangerous condition.

In opposition to the motion, plaintiff claims that defendants failed to establish their prima facie entitlement to summary judgment or, in the alternative that issues of fact exist regarding whether they had such notice. In opposition to the motion,

plaintiff submits an affidavit in which she states, inter alia, that "[i]mmediately before [she] fell [she] saw the ice which caused [her] to slip and fall." Doc. 49. She also annexes to her affidavit two photographs which, she claims, "fairly and accurately depict the condition that caused [her] to fall." Doc. 49. Additionally, plaintiff's attorney submits weather records which, he argues, prove that snow which fell prior to the date of the incident melted and refroze, causing plaintiff's accident. Doc. 49.

LEGAL CONCLUSIONS:

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].)

Defendants have established their prima facie entitlement to summary judgment by submitting plaintiff's 50-h and deposition transcripts as well as Romero's deposition transcript, affidavit and snow removal and sanding log. This

evidence demonstrates that defendants did not have actual or constructive notice of the alleged icy condition that caused plaintiff's fall. Specifically, Romero states that he was not aware of any complaints about the condition of the sidewalk prior to plaintiff's fall and that he had inspected the sidewalk at 4 p.m., approximately 60-90 minutes before the accident, and saw no snow or ice. *George v New York City Hous. Auth.*, 151 AD3d 532, 533 (1st Dept 2017) (citations omitted).

Although plaintiff's counsel attempts to raise an issue of fact by arguing that snow which fell prior to the date of the incident melted and refroze, this contention, based only on his own conclusions as a layperson, is speculative. *See generally Acar v Ecclesiastical Assistance Corp.*, 125 AD3d 464 (1st Dept 2015) (opinion of expert meteorologist that ice formed due to melting and refreezing was speculative).

Additionally, the motion must be denied because plaintiff seeks to feign an issue of fact. *See Stovall v New York City Transit Authority*, 181 AD3d 486 (1st Dept 2020) (citations omitted). Specifically, although plaintiff testified at her 50-h hearings and deposition that she fell on snow, she states in her affidavit in support of the motion that she fell on ice. Although she testified at her deposition that "[i]t must be" that she fell on ice (Doc. 42 at 47-50), such testimony was speculative and thus insufficient to defeat the motion. *See Bunn v City of New York*, 180 AD3d 550 (1st Dept 2020). In any event, plaintiff later changed her testimony and said she believed she slipped on snow. Doc. 42 at 52-53.

Further, the photographs annexed to plaintiff's affidavit do not warrant denial of the motion. Even assuming, arguendo, that the photographs were properly authenticated, plaintiff does not indicate on the pictures precisely where she fell. The black and white photographs depict ice and snow in the area of the sidewalk in the middle of the block and adjacent to and along the curb. However, the photographs reveal that an area of the sidewalk several feet wide was free of snow and ice. Thus, it appears evident that plaintiff only encountered snow and/or ice on the sidewalk because, as she conceded, she did not cross 143rd Street at the crosswalk.

This Court also notes, as indicated by defendants, that, although plaintiff testified at her 50-h hearings and her deposition with the use of a Spanish interpreter, her affidavit is unaccompanied by any proof that she understood the contents thereof, which are in English, before signing the same.

The final reason for the denial of the motion is that plaintiff's counsel failed to comply with the Part 2 rules, which require that all exhibits be individually filed and labeled on NYSCEF.

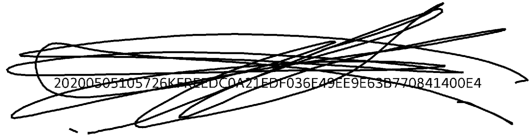
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants New York City Housing Authority and NYCHA I Housing Development Fund Corporation seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is granted, and the complaint is dismissed; and it is further

ORDERED that, within 10 days of entry of this order, counsel for defendants shall serve this order on counsel for plaintiff, with notice of entry; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.



5/5/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE