

Gjata v Baja 364 LLC
2020 NY Slip Op 33765(U)
November 10, 2020
Supreme Court, New York County
Docket Number: 155442/2018
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

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INDEX NO. 155442/2018

LAURETA GJATA,

MOTION DATE 08/27/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

BAJA 364 LLC,BIG APPLE MANAGEMENT, LLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing papers, defendant Baja 364, LLC (Baja) and defendant Big Apple Management, LLC (Big Apple) (collectively defendants) move for summary judgment pursuant to CPLR 3212. For the reasons stated herein, the motion is denied.

Plaintiff commenced this action on May 25, 2018 seeking damages and attorneys' fees arising from injuries sustained on April 18, 2018 when she tripped and fell due to an allegedly defective step in a stairwell between the third and second floors of the apartment building located at 364 W. 51st Street in the County, City and State of New York. Gjata, a tenant at the premises owned by Baja and managed by Big Apple, claims the stairs were made of wood, which were unstable, and had a variance between steps. Plaintiff alleges her injuries were the result of defendants' negligence in their operation, management, maintenance, control, supervision and inspection of the premises and stairway therein; and in having actual or constructive notice that a dangerous or defective condition existed without any warning or repair.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (Dallas-

Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [internal quotation marks and citation omitted]). “[A] motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

“A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). “Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof” (*id.*). “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 v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]). “[A] ‘general awareness’ that a dangerous condition may be present is legally insufficient to constitute notice of a particular condition that caused plaintiff’s fall” (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

Here, defendants argue they are entitled to summary judgment because they did not create a dangerous or defective condition or have actual or constructive notice of the condition. Moreover, if the condition is a latent defect, constructive notice cannot be imputed. In support of defendants’ motion for summary judgment, they proffer photos of the accident site, plaintiff’s deposition transcript, an affidavit from the building superintendent Senad Bencovic (Bencovic),

and plaintiff's bill of particulars. As a preliminary matter, plaintiff incorporates the same proffered exhibits as defendants with the addition of plaintiff's exhibit: New York City's Department of Housing and Urban Development (HPD) Complaint History, with a complaint date of 10/02/2017 for a broken staircase.

In opposition, plaintiff argues there are still questions of fact as to whether defendants had notice of the defective, unstable staircase. Specifically, plaintiff avers defendants had actual notice since Gjata testified to telling the property manager for Big Apple, Eric Khorshad (Khorshad), the building's stairs were unstable and not safe and that Khorshad promised the stairs would be fixed; as well, the HPD Complaint History shows actual notice that the broken staircase was recorded in October 2017. Finally, plaintiff contends defendants' proffered evidence is insufficient as a matter of law to establish defendants lacked notice of a defective condition because defendants' do not proffer particularized specific inspection dates and times necessary to defeat a question of fact on summary judgment.

When a “[d]efendant[...] fail[s] to offer specific evidence as to their activities on the day of the accident, including evidence indicating the last time [a] staircase was inspected or maintained before plaintiff fell”, a motion for summary judgment should be denied (*Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [1st Dept 2008]; see *Joachim v AMC Multi-Cinema, Inc.*, 2014 NY Slip Op 31749[U] [Sup Ct, NY County 2014] [“general inspection and cleaning practices of the theater [...] does] not provide evidence as to when the area in question was last inspected”]).

Here, defendants have not met their initial burden for summary judgment as a matter of law. Although defendants submitted an affidavit of Becovic, who stated that he inspected the stairs 20 times per week and never observed any loose or unstable stair tread, the affidavit lacks

any reference to an inspection of the stairs on the day in question (*see e.g. Cater v Double Down Realty Corp.*, 101 AD3d 506 [1st Dept 2012] [“Defendants failed to offer specific evidence as to their activities on the day of the accident, including evidence indicating the last time the staircase was inspected, cleaned, or maintained before plaintiff’s fall”]). Even if defendants met their initial burden for summary judgment, there are still genuine issues of material fact as to whether defendants had actual notice of the dangerous or defective condition from the proffered HPD Complaint History (NYSCEF Doc. No. 32) and Gjata’s deposition transcript (NYSCEF Doc. No. 26) (*see Scott*, 294 AD2d 348 [A “motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility”]).

Accordingly, it is hereby ORDERED that the motion is denied. This constitutes the decision and order of the Court.

11/10/2020
DATE


ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE