Morales v CMN Props., LLC
2020 NY Slip Op 34616(U)
May 5, 2020
Supreme Court, Queens County
Docket Number: Index No.: 713113/2017
Judge: Phillip Hom
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SHORT FORM ORDER

FILED & RECORDED

5/11/2020
9:48 AM

COUNTY CLERK
QUEENS COUNTY

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Phillip Hom
Justice

IAS PART 43

EDNA MORALES,

Plaintiff,

-against-

CMN PROPERTIES, LLC,

Defendant.

Index No.: 713113/2017
Motion Submitted: 2/20/20
Seq. No.: 1
Cal. No.: 23

The following numbered papers read on this motion by plaintiff for partial summary judgment on the issue of liability and setting the matter down for assessment of damages.

Papers	Numbered
Notice of Motion - Affidavits - Exhibits	E 12-22
Answering Affidavits - Exhibits	E 24-34
Reply	E 35

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Edna Morales ("Morales") commenced this action by filing the Summons and Complaint on September 21, 2017. Defendant CMN Properties, LLC ("CMN") filed its answer on November 11, 2017. Morales is suing for personal injuries for a slip and fall on the stairway at her building at 76-18 Jamaica Avenue, Woodhaven, Queens County (the "property"). CMN owned and managed the property on July 9, 2017, the date of the accident.

On a motion for summary judgment, the proponent "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 from the case..." (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 852 [1985]). "In order to establish a prima facie case of negligence in a slip and fall accident, a plaintiff must establish actual or constructive notice of the condition which caused the fall; this requires either proof that a

defendant created the condition or that there was a reasonable opportunity to remedy the situation." (*Torri v Big V of Kingston, Inc.*, 147 AD2d 743, 744 [3d Dept 1989]). "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]).

Morales lived in a second-floor apartment at the property. She alleges she complained to CMN that the carpet on the stairs was torn and frayed, and not affixed to the stairs. She alleges in her examination before trial that she complained to the owner every time she paid rent, and that CMN had notice of the condition in late March or early April of 2017 when Chris Kuchta, a 50% owner of CMN, visited the property. Chris Kutcha stated the picture of the stairs taken by Morales in March 2017 and presented to him at his EBT was accurate. On July 9, 2017, Morales slipped on the third step from the bottom of the stairs.

In support of the motion, Morales presented the affidavit of an expert, Charles Pisano, Jr., P.E., an engineer licensed to practice in the State of New York. He stated he personally inspected the premises on September 1, 2017, and took pictures. Mr. Pisano stated that the staircase violated section 1009 of the Building Code of the City of New York ("Building Code") and that it violated good and accepted engineering safety and construction practices because the handrail ended prior to the end of the stairs and did not continue beyond the tread of the last riser. Mr. Pisano concluded that the condition of the stairs constituted a dangerous condition on the premises and was the proximate cause of Morales' fall.

The movant initially bears the burden of setting forth evidentiary facts sufficient to entitle that party to judgment as a matter of law. Only then does the burden shift to the opposing party to come forward with proof (*see Piccolo v De Carlo*, 90 AD2d 609 [3rd Dept 1982]). Movant meets its burden with Morales' deposition testimony and the expert's report.

Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which requires a jury trial (*Alverez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). In opposition, CMN submits the deposition testimony of Chris Kucha and affidavit of Mark Kucha alleging that they did not have notice of the defect. Chris Kucha also stated that Morales never paid rent to CMN. CMN further alleges Morales wore sandals that may have contributed to and caused her fall and that she did not hold the hand rail. CMN also presents an expert, Rudi Sherbanshy, an engineer licensed to practice in the State of New York, who examined the stairs on December 18, 2019. He challenged

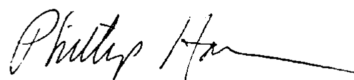
the allegation that the stairs violated the Building Code, stating that since the property was built in the early 1900s, it would not have been subject to any version of the modern Building Code because the 1968 Building code grandfathered the stairs as long as they were in compliance at the time they were built.

CMN raises issues of fact as to whether it had notice of the alleged defect. Morales alleges she complained about the alleged stairway defect every time she paid rent and that she told Chris Kucha. However, Chris Kucha testified Morales never complained and never paid rent. The conflicting testimony raises questions of fact and credibility issues that require a trial to determine the liability of the respective parties (see *Perla v Wilson*, 287 AD2d 606 [2nd Dept 2001]).

Accordingly, Morales motion for partial summary judgment on the issue of liability is denied.

This constitutes the Decision and Order of this Court.

Dated: May 5, 2020



Hon. Phillip Hom, J.S.C.

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