

**Tuck v Surrey Carlton Hous. Dev. Fund Corp.**

2020 NY Slip Op 34650(U)

April 23, 2020

Supreme Court, Rockland County

Docket Number: Index No. 035747/2018

Judge: Sherri L. Eisenpress

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
MARGARET TUCK,

*Plaintiff,*

*-against-*

**DECISION AND ORDER  
(Motion # 1)**

Index No.: 035747/2018

SURREY CARLTON HOUSING DEVELOPMENT FUND  
CORP.,

*Defendant.*

-----X  
*Sherri L. Eisenpress, A.J.S.C.*

The following papers, numbered 1 to 4, were considered in connection with Defendant Surrey Carlton Housing Development Fund Corp.'s Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment in its favor and dismissing the action, along with such other and further relief as this Court shall deem proper:

<b><u>PAPERS</u></b>	<b><u>NUMBERED</u></b>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS (A-F)	1-2
AFFIRMATION IN OPPOSITION	3
AFFIRMATION IN REPLY/EXHIBIT "A"	4

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff with the filing of the Summons and Complaint on September 25, 2018. Issue was joined with the service of an Answer on December 11, 2018. Discovery proceeded and the instant summary judgment motion was timely filed. Plaintiff alleges that on March 11, 2018, she was caused to sustain personal injuries when a windowpane located in the stairwell of her apartment building fell on her, shortly after she attempted to open the window.

Plaintiff testified that on the day of the accident, a Sunday, she attended church in the morning and upon her return, she passed the subject window located between the first and second floors of her building and observed nothing wrong with it. In fact, she testified

that she never had any prior problems, complaints or incidents involving the window, and would on occasion open or close the window without incident, as did other tenants. Later that evening she left her apartment in order to visit a relative at Nyack Hospital. As she approached the landing and window, she noticed that the bottom window was open about one inch and wanted to open it a little more. She testified that she touched the window for a "split second" and then kept moving. When she turned towards her right on the landing in order to descend the next set of steps, she felt an impact to her neck. Plaintiff did not see the window fall on her or know how it detached.

Defendant produced Bob Nixon, its property manager, for a deposition. He reported to the scene shortly after the subject occurrence and observed the window on the floor, which had not broken but which he testified appeared to have been unlatched and removed. Mr. Nixon testified that he and his staff sweep the subject stairwell every Monday, Wednesday and Friday and he checks the hallways every day. He recalled that he last checked the subject window "a couple of days" before the incident when the window was open and he closed it. He observed nothing wrong with the window at that time. Mr. Nixon was not aware of any prior complaints about the window and there were no prior similar accidents. After the accident, he placed the windowpane back into position and it functioned properly.

Defendant filed the instant Notice of Motion seeking an Order granting summary judgment and argues that the action must be dismissed, as there is no actual or constructive notice of a defective condition. It asserts that constructive notice will not be imputed where the defect is latent, and here, neither Plaintiff nor Defendant testified that they observed a defective condition. Defendant notes that it is not expected to "patrol the staircases 24 hours a day" and Mr. Nixon had testified that he inspected the window a few days before the accident and found nothing wrong.

In opposition, Plaintiff argues that Defendant failed to meet its initial burden of demonstrating that it did not have constructive notice of the condition. Plaintiff contends that Mr. Nixon only testified as to his general inspection and cleaning practices and he did not say

that he inspected the subject window in the two days leading up to the accident. With respect to whether there was a defective condition, Plaintiff contends that the "reasonable conclusion to be drawn from the testimony is that either the locking mechanism did not engage and did not secure the window in place or the window was plainly not secured at all and fell on Plaintiff after the window did not open." She asserts that timely inspection would have led to the discovery of the problem.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

"A landowner has a duty to maintain his or her property in a reasonably safe condition under the existing circumstances, and may be liable in tort if the plaintiff can establish that the landowner either affirmatively created or had actual or constructive notice of a hazardous condition." Austin v. Town of Southampton, 113 A.D.3d 711, 712, 979 N.Y.S.2d 127 (2d Dept. 2014); Walsh v. Super Value, Inc., 76 A.D.3d 371, 375, 904 N.Y.S.2d 121 (2d Dept. 2010). "The general rule is that '[t]o constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time before the

accident to permit the defendant an opportunity to discovery and remedy it...[C]onstructive notice will not be imputed where a defect is latent and would not be discovery upon reasonable inspection.” Lal v. Shing Po Ng, 33 A.D.3d 668, 823 N.Y.S.2d 429 (2d Dept. 2006).

To meet its prima facie burden on the lack of constructive notice, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell. Rong Wen Wu v. Arniotes, 149 A.D.3d 786, 787, 50 N.Y.S.3d 563 (2d Dept. 2017). “An established reasonable cleaning routine precludes the imposition of liability.” Thomas v. Sere Housing Development Fund Corporation, 175 A.D.3d 1129, 108 N.Y.S.3d 10 (1<sup>st</sup> Dept. 2019).

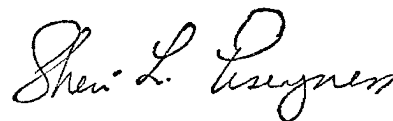
In the instant matter, Defendant has met its burden on summary judgment with respect to the issue of notice. It is undisputed that there was no actual notice and with respect to the absence of constructive notice, Defendant has not only set forth its reasonable inspection/cleaning schedule but Mr. Nixon testified that a few days before the accident, he actually inspected the subject window but did not notice any defective condition. Likewise, Plaintiff testified that she never observed anything wrong with the window, including a few hours before the incident. Moreover, given that the accident happened on a Sunday evening, it would not have been unreasonable to have inspected the window on the Thursday or Friday before the incident. A landlord is not required to patrol its staircases 24 hours a day. Love v. New York City Hous. Auth., 82 A.d.3d 588, 919 N.Y.S.2d 149 (1<sup>st</sup> Dept. 2011.) In opposition to Defendant’s prima facie showing, Plaintiff has failed to demonstrate a triable issue of fact sufficient to deny summary judgment with respect to the issue of notice.

Accordingly, it is hereby

**ORDERED** the Notice of Motion filed by Defendant Surrey Carlton Housing Development Fund Corp.is GRANTED in its entirety, and the Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York  
April 23, 2020



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**HON. SHERRI L. EISENPRESS**  
**Acting Justice of the Supreme Court**

TO:

All parties via NYSCEF