

Texidor v New York City Hous. Auth.

2022 NY Slip Op 30174(U)

January 21, 2022

Supreme Court, New York County

Docket Number: 161255/2018

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

[*1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

SANTA TEXIDOR

INDEX NO. 161255/2018

- v -

MOT. DATE

MOT. SEQ. NO. 5-7

NEW YORK CITY HOUSING AUTHORITY

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS Doc. No(s).

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS Doc. No(s).

Replying Affidavits

ECFS Doc. No(s).

This is a personal injury action. There are three motions presently pending. In motion sequence 5, defendant New York City Housing Authority ("NYCHA") moves for partial summary judgment dismissing plaintiff's theories of liability which were purportedly not asserted in her notice of claim or complaint. Plaintiff opposes that motion.

In motion sequence 6, plaintiff moves for partial summary judgment on the issue of liability in the above-captioned action entitled Santa Texidor v. New York City Housing Authority, pending in this court and bearing Index #: 161255/2018 (Action 1) as well as the action captioned Santa Texidor v. New York City Housing Authority, also pending in this court bearing Index # 161283/2018 (Action 2). Both actions have since been consolidated under the above-captioned index number. NYCHA opposes plaintiff's motion.

Finally, in motion sequence 7, plaintiff moves by order to show cause for an order permanently sealing NYSCEF Document Number 246, permanently removing NYSCEF Document Number 247, a protective order directing NYCHA and its counsel to destroy all copies of NYSCEF Document Number 247 and sanctions against Joshua Ram, Esq., a former partner in the law firm which previously represented plaintiff in this action. Attorney Ram opposes the motion, which was orally argued on the return date, October 19, 2021.

All three motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Note of issue was filed on May 5, 2021 and both motion sequences 5 and 6 were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court will first consider plaintiff's motion for partial summary judgment on liability.

Motion sequence 6

Plaintiff is suing for personal injuries she sustained when she slipped and fell twice on an interior

Dated: 1/21/22

HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION
seq 5&6 seq 7

2. Check as appropriate: Motion is

GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST
FIDUCIARY APPOINTMENT REFERENCE

[*2]

staircase leading from the ground level to the first floor, at her NYCHA apartment building located at 228 West 62nd Street, New York, New York, 10023 (the "building"). Plaintiff's accidents occurred on March 12 and 26, 2018. Plaintiff has lived in the building since 1976 and testified at her deposition that she went up and down the subject staircase daily.

At her 50-h hearing, plaintiff testified that she slipped/fell due to "all the cracks in the stairs." She further testified "[t]he whole stair is full of cracks" and "[i]t's got holes, you know. It's got so many holes that you don't know how many is there. It's the whole stair that needs to be fixed."

On the day of her first accident, plaintiff testified at her deposition that when she walked down the stairs to exit the building that morning, there was blue carpeting on the stairs. When she came back, the carpeting had been removed and there were small rocks on the stairs. Plaintiff testified that the rocks may have contributed to her first accident:

Q. Was there something about the crack that caused your foot to slip?

A. It's, it's – maybe it's because all those little rocks that I told you was all over the stairs.

Q. Okay. Were there any rocks on the stairs on the stairs at the time you slipped?

A. Yes, there was --.

...

Q. How many did you see?

A. I see – I saw a lot of them.

Q. When you say a lot, is that five, is it 1200, is it 300, how many?

A. Maybe, maybe 10.

...

A. They're little rocks, they come from the roof.

Q. Did you see rocks fall from the roof?

A. No, they come from the roof.

Q. How do you know they came from the roof?

A. Because that's where they fixing, at the roof.

...

Q. When was the first time that you saw rocks on the stairs prior to March 12th, 2018?

A. The first time they started bringing the rocks down.

Q. And what day was that?

A. I really cannot tell you the day. It started in the – before my accident.

...

Q. Is it correct that you first saw rocks on the stairs six months before your accident?

A. Yes.

...

Q. Were they the same size as peas or were they bigger than peas?

A. The same size as peas.

Plaintiff claimed that she saw rocks on the stairs for approximately six months before her accidents, almost every day. Plaintiff admitted that she never made a complaint about rocks on the stairs to NYCHA. At her second deposition, plaintiff explained that the workers working on the roof put a blue carpet over the stairs. Also, at this second deposition, plaintiff testified that she didn't notice whether or not there were any rocks on the stairs on the date of her second accident.

Meanwhile, on July 24, 2017, NYCHA employee Yvonne Fernandez generated a work order to repair the step plaintiff allegedly fell on. The work order, which has been provided to the court, states in relevant part: "3rd step inside lobby entrance step nose broken". Fernandez authenticated the work order at her deposition and explains that the problem code listed thereon was "steps, tripping hazard".

[*3]

Fernandez further testified that she learned of the condition from “[t]he maintenance men”. Specifically, Fernandez explained:

Q. Okay. How did you get that information from them? Was that in person, telephone, email, text message?

A. In person verbally.

Q. Okay. And where were you and where were they?

A. In the maint – in my office.

...

Q: You then generated the work order, Plaintiff’s Exhibit 2 from January 5th?

A: Repeat that?

Q: You then generated the work order we’re talking about, Plaintiff’s Exhibit 2 where it says third step, step nose broken?

A: Yes.

Fernandez further testified that according to the work order, work was performed and the ticket was closed. The work order itself states: “STEPNOSEREPAIRED TREADREPAIRED” and “Completed 10-31-2017 03 10 PM”.

Plaintiff claims that from July 24, 2017 through the dates of her accidents, the steps were either not repaired or any work performed did not comport with good and accepted construction and engineering practices. In support of the motion, plaintiff has provided her own affidavit as well as the affidavit of Robert Schwartzberg, P.E.

Schwartzberg conducted a visual inspection of the subject staircase on August 6, 2018 and took photos, which have been provided to the court. Schwartzberg states in relevant part:

From the time period July 24, 2017, through the dates of [plaintiff’s] accidents, the only conceivable work performed to the subject step may entailed painting, patching or otherwise coating the subject step with a mortar. I can conclude, to a high degree of engineering certainty, that painting, patching or otherwise coating the subject step with a mortar, fails to comport with good and accepted construction and engineering practices. As stated above, proper and workmanlike repair of the subject step would have entailed complete demolition of the stairway and rebuilding of same from the lower landing up.

It is my professional opinion, with a high degree of engineering certainty, that as a result of the lack of an anti-slip metal nosing, and irregular and uneven surfacing, including the displaced, cracked, gouged, and broken concrete at the nosing and atop the tread at the subject step, there existed known unsafe and hazardous conditions thereat for over seven months prior to [plaintiff’s] accidents.

Otherwise, Schwartzberg lists numerous provisions of the 1938 Building Code, the State Uniform Fire Prevention Building Code and the New York City Construction Code which he believes NYCHA violated.

NYCHA has provided its own liability expert affidavit from Mark I Marpet, Ph.D. P.E. Marpet disputes Schwartzberg’s findings, questions Schwartzberg’s analysis and based upon his own inspection on August 26, 2020, opines that the stairs were “safe and were not the causal (sic) in Plaintiff’s accident.”

Plaintiff argues that she has established that NYCHA had actual notice of the condition of the stairs and failed to perform the required repairs. Therefore, plaintiff maintains that NYCHA was negligent as a matter of law. In turn, defendant argues that it did perform repairs, the step was not defective and at a minimum defendant has raised triable issues of fact as to liability.

[*4]

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Numerous triable issues of fact preclude summary judgment in favor of plaintiff. Contrary to her counsel's contention, there are disputes as to what caused each of plaintiff's falls. Plaintiff has conflated her accidents and it is unclear to the court whether plaintiff fell due to the condition of the stairs or due to rocks on the stairs on either or both of the dates of her accident. Further, if plaintiff only fell due to rocks on the stairs, plaintiff has failed to demonstrate that the defendant had notice as a matter of law. (Interrelated with plaintiff's motion, NYCHA's request to dismiss plaintiff's theory of liability based upon the rocks is denied [*infra*].) While NYCHA has a duty to maintain the stairs in a reasonably safe condition, the rocks were certainly a transient condition as plaintiff did not testify they were present on the stairs when she left the building earlier the day of her accident and otherwise has offered no testimony as to how long the rocks existed on the stairs. To the extent that plaintiff proffers that NYCHA should have known that construction workers were leaving rocks on the stairs, thus making it a reoccurring condition, the record is devoid of sufficient facts which would prove this claim. Indeed, plaintiff admitted that she never made a complaint about rocks on the stairs, even though she claimed to have personally observed this condition daily Monday through Friday for six months prior to her accident.

The court also finds that it remains for a fact finder whether and to what extent plaintiff's testimony should be credited. Plaintiff was unclear about the rocks and vague, at best, as to the nature of them, where she thought they came from and when she observed them. Plaintiff admitted that she never personally observed construction workers on the roof of the building and also stated that they would take rocks down from the roof in buckets via the elevators. Even as to the size of the rocks, plaintiff repeatedly testified that she did not know what size they were but then also testified that they were the size of peas.

Finally, there is a dispute as to whether NYCHA adequately repaired the stairs and the step nose and tread on the step which plaintiff slipped and fell on. While plaintiff asserts the contrary, NYCHA has come forward with proof that the subject step was repaired months prior to plaintiff's accident and plaintiff has not shown that NYCHA had notice of a defective or dangerous condition on the subject step thereafter. Whether NYCHA's repairs were adequate remains to be determined and the court cannot resolve as a matter of law the expert opinions offered by each side. For all these reasons, plaintiff's motion for partial summary judgment on liability must be denied.

Motion sequence 5

In support of its own motion, NYCHA contends that plaintiff has asserted new theories of liability in her supplemental Bill of Particulars ("supp BP") which should be dismissed because they were not asserted in plaintiff's notice of claim or her complaint. The disputed portion of the supp BP is as follows:

In negligently supervising construction workers who were working in and around the subject building on the day of the accident and for several months prior to the accident;

[*5]

In allowing rocks/stones to be and remain on the subject staircase for an extended period of time when defendant knew or should have known of same and failed to remedy same;

In allowing rocks/stones, which caused a slippery condition on the subject staircase, to exist for an extended period of time when defendant knew or should have known of same and failed to remedy same;

A new distinct theory of liability not asserted in a timely notice of claim may only be interposed in a late notice of claim (*Mahase v. Manhattan and Bronx Surface Transit Operating Authority*, AD3d 410 [1st Dept 2004]). Absent leave to serve a late notice of claim, an option no longer available to plaintiff here, new theories of liability must be dismissed (*Monmasterio v. New York City Housing Authority*, 39 AD3d 354 [1st Dept 2007]). “The test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable [NYCHA] to investigate” (*Ingrao v. New York City Transit Authority*, 161 AD3d 683 [1st Dept 2018] quoting *Brown v. City of New York*, 95 NY2d 389 [2000] [internal quotation marks omitted]). When the information supplied in a notice of claim is sufficient to enable a defendant to promptly and adequately investigate a claim premised upon a particular theory of liability, that claim will not be dismissed (*Monmasterio, supra*).

The court agrees with plaintiff that the challenged portions of the supp BP are not predicated upon new theories of liability. Rather, as plaintiff’s counsel convincingly argues, plaintiff’s notice of claim apprised NYCHA that she slipped and fell due to stairs that were negligently maintained and specifically “due to a broken, raised, cracked, depressed, extended, misaligned and/or uneven step and/or a protrusion, obstruction and/or a hole and/or a slippery liquid condition and/or a wet substance located at the aforementioned location.” Further, plaintiff claimed that “[t]he accident occurred due to the carelessness, recklessness and negligence of [NYCHA] in the ownership, operation, maintenance, repair, design, construction, renovation, supervision and control of the [stairs]” and “in failing to adequately clean up the said substance within a reasonable time as they had either actual and/or constructive notice of said defective condition then and there existing at the time of the accident.”

Thus, while NYCHA argues that plaintiff’s notice of claim “did not remotely suggest that she would subsequently allege that NYCHA was negligent in its supervision of construction workers or that NYCHA was negligent in allegedly allowing rocks/stones to be and remain on the subject staircase”, the court disagrees.

Accordingly, NYCHA’s motion is also denied.

Motion sequence 7

The last motion arises from a partnership dispute between partners of the former firm which represented plaintiff and has since dissolved and Attorney Ram, a former member of that firm. That dispute is the subject of litigation currently pending in Nassau County Supreme Court entitled Ram et al. v. Joudeh et al., Index No. 611751/2021 (the “Partnership Action”). Plaintiff’s counsel asserts that documents filed by Attorney Ram in this action, specifically NYSCEF Document Numbers 246 and 247, should not have been filed and should be sealed because they contains sensitive client information. Both documents have since been removed from public access. However, in his opposition to this motion, Attorney Ram quoted information which is the subject of this order to show cause.

Meanwhile, Attorney Ram disputes plaintiff’s counsel’s claims, argues that he was not properly served with the underlying motion papers and contends that the motion should be nonetheless denied. Otherwise, Attorney Ram makes a number of irrelevant claims about the parties’ backgrounds and the events leading up to the creation through dissolution of his former firm.

[*6]

At the outset, there is no opposition from NYCHA with respect to plaintiff's application for an order directing NYCHA and its counsel to destroy all copies of NYSCEF Document Number 247. Therefore, that portion of the motion is granted without opposition.

Despite Attorney Ram's protestations to the contrary, the court finds that the information contained in his affirmation is inappropriate since it discusses alleged Child Victims Act cases and provides significant identifying information and is otherwise wholly irrelevant to this action and should not have been filed here in the first place. It is outrageous for Attorney Ram to make such information publicly available as it concerns vulnerable minors who did not consent to the release of such information on this record.

Attorney Ram has engaged in further sanctionable conduct, including leveling serious allegations against his former law partner that go well beyond the issues before this court. Attorney Ram is an experienced attorney and should know full well that he is ethically bound not to disclose client confidences or attorney work-product. There can be no dispute that Attorney Ram should have joined in this application when plaintiff's counsel first approached him about the impropriety of his filings. Yet, Attorney Ram has doubled down and opposes the application without any basis in law or fact as to why the subject documents should remain part of the court's file on this case.

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. Frivolous conduct is defined as conduct which: [1] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false.

The court finds that Attorney Ram's conduct is completely without merit and was designed to injure his former law partners. Even his opposition asserts material factual statements that are false. Accordingly, the court hereby sanctions Attorney Ram \$1,000 plus plaintiff's counsel's costs and reasonable attorney's fees for making motion sequence 7 and further sets down for a Special Referee or JHO to hear and **report** the issue of what costs and reasonable attorneys fees plaintiff's counsel incurred and is entitled to recover from Attorney Ram in connection with making motion sequence 7.

The only remaining issue before the court is whether Attorney Ram's affirmation in opposition should be sealed. As a general rule, the public is entitled to access to judicial proceedings and court records (*Mosallem v. Berenson*, 76 AD3d 345 [1st Dept 2010] citing *Mancheski v. Gabelli Group Capital Partners*, 39 AD3d 499 [1st Dept 2007]). The public's right to access, however, is not absolute (*id.* citing *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1 [2000]). Nonetheless, petitioners and Berkshire bear a heavy burden on their respective motions.

Pursuant to 216.1(a) of the Uniform Rules for Trial Courts (22 NYCRR 216.1[a]):

Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.

"Although the term 'good cause' is not defined, 'a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action'" (*Mosallem, supra* at 349, quoting *Gryphon Dom. VI, LLC*, 28 AD3d 322, 325 [1st Dept 2006]; see also *Abe v. New York University*, 169 AD3d 445 [1st Dept 2019]). The party seeking to seal court records must demonstrate compelling circumstances to justify restricted public access (*Mancheski, supra* at 502; see also *Maxim, Inc. v. Feifer*, 145 AD3d 516 [1st Dept 2016]; see also *Wilder v. Fresenius Medical Care Holdings, Inc.*, 175 AD3d 406 [1st Dept

[*7]

2019] ["plaintiff has failed to make a showing of a substantial privacy right that outweighs the customary and constitutionally-embedded presumption of openness in judicial proceeding"). The First Department, however, has been reluctant to allow the sealing of court records, even when both parties have presented a joint application (see *i.e. Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V.*, 28 AD3d 322 [1st Dept 2006]).

There can be no dispute that paragraph 48 of Attorney Ram's affirmation should not be available for public access as the right to privacy of the persons which Attorney Ram has identified and their potential claims outweighs the public's right to access this information. Accordingly, the County Clerk is directed to mark sealed NYSCEF Document Number 278 upon service of notice of entry of this decision/order and Attorney Ram shall refile his affirmation in opposition to motion sequence 7, redacting paragraph 48 thereof, within 7 days upon service of this order upon him with notice of entry.

CONCLUSION

In accordance herewith, it is hereby **ORDERED** that motion sequence numbers 5 and 6 are denied; and it is further

ORDERED that motion sequence 7 is granted to the following extent:

[1] Attorney Ram is directed to refile his affirmation in opposition to motion sequence 7, NYSCEF Document Number 278, redacting paragraph 48 in its entirety;

[2] NYSCEF Document Number 278 shall be marked sealed upon service of a copy of this order with notice of entry upon the County Clerk along with the appropriate NYSCEF Form located at <https://iappscontent.courts.state.ny.us/NYSCEF/live/forms/notification.for.sealing.pdf>;

[3] Joshua Ram, Esq. is hereby sanctioned for frivolous conduct as follows: \$1,000 plus Attorney Ram shall reimburse plaintiff's counsel for making motion sequence 7; and

[4] NYCHA and its counsel shall destroy all copies of NYSCEF Document Number 247 in their possession and may not use or rely upon them in this litigation or for any other purpose.

And it is further **ORDERED** that the issue of what costs and reasonable attorneys fees plaintiff's counsel incurred and is entitled to recover from Attorney Ram in connection with making motion sequence 7 is set down for a Special Referee or JHO to hear and **report**; and it is further

ORDERED that plaintiff's counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet¹, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part or JHO for the earliest convenient date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/21/22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

¹ Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh (under the "References" section of the "Courthouse Procedures link).