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| Fabian v Memadet Realty Corp. |
| 2022 NY Slip Op 32214(U) |
| January 18, 2022 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 24563/2019 |
| Judge: Laura G. Douglas |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 6

Index No. 24563/2019

ABRAHAM FABIAN,

Plaintiff,

-against-

MEMADET REALTY CORPORATION,

Defendant.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J. S. C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment (seq. no. 2):

| <u>Papers</u> | <u>Numbered</u> |
|---|-----------------|
| Defendant’s Notice of Motion, Statement of Material Facts by Thomas J. Cicillini, Esq. dated July 21, 2021, Affirmation of Thomas J. Cicillini, Esq. dated July 21, 2021 in Support of Motion, and Exhibits (“A” through “G”)..... | 1 |
| Affirmation of James A. Domini, Esq. dated October 21, 2021, in Opposition to Motion and Plaintiff’s Counter-Statement of Material Facts by James A. Domini, Esq. dated October 21, 2021..... | 2 |
| Reply Affirmation of Thomas J. Cicillini, Esq. dated October 25, 2021..... | 3 |

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendant (“Memadet Realty”) seeks summary judgment pursuant to CPLR § 3212 dismissing the plaintiff’s complaint in its entirety. The motion is denied.

The plaintiff (“Fabian”) seeks monetary damages for personal injuries allegedly sustained on July 26, 2016, when a portion of the ceiling in his apartment’s bathroom fell on him. The defendant owned and/or operated the subject building. Fabian claims that Memadet Realty was negligent in maintaining the building in a reasonably safe condition and that it had actual or constructive notice of the hazardous condition that caused the ceiling to fall. Memadet Realty denies these allegations and argues that the ceiling fell due to an overflowing bathtub in the apartment above, an unexpected event

which it did not create or have notice of in time to prevent or correct the hazard.

To obtain summary judgment, Memadet Realty must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corporation.*, 18 NY3d 499, 503 [Ct App 2012]). To defeat such a showing, Fabian must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists which precludes summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). In this premises liability action, Fabian must demonstrate the existence of a defective or dangerous condition and either that Memadet Realty created such condition or had actual or constructive notice of the hazard and failed to timely correct it (*see Litwack v. Plaza Realty Investors, Inc.*, 11 NY3d 820 [Ct App 2008]).

In support of its motion, Memadet Realty contends that Fabian's own deposition testimony reveals that he does not know what caused the bathroom ceiling to fall, that he did not expect the ceiling to fall, and that there was nothing about the ceiling that indicated that it was about to fall when it did. Memadet Realty notes that Fabian never noticed any water dripping down through the bathroom ceiling or anywhere else prior to the incident, though water did come down when the ceiling collapsed. Fabian also testified that he did not hear any strange noises or observe bulging or bubbling prior to the incident. The ceiling did not look like it was going to cave in prior to doing so. Fabian was unaware of any prior ceiling collapse or leak in any other unit in the building. No paint or pieces of the ceiling had fallen from the bathroom's ceiling previously. The building's superintendent had never performed any work in his apartment prior to the accident. Fabian testified that he did not know what caused the ceiling to fall and was not aware of anything that the building had done that caused or contributed to its collapse.

In addition, Memadet Realty submits the deposition testimony of Angel Jimenez ("Jimenez"), the building's superintendent. Jimenez has been the superintendent since 2007, with the responsibility to fix any and all problems that arose in the building. The tenants knew that they were to notify him directly of any problems in their apartments. Jimenez testified that he personally responded to this ceiling collapse. He avers that this was the only time that he had been in Fabian's bathroom. He went into the apartment above and observed that the bathtub was overflowing at the time, with water spilling

over its side. Jimenez attributes the ceiling collapse to this condition.

This admissible evidence satisfies Memadet Realty's initial burden to show that it neither created the condition that caused the ceiling to fall nor had notice of the condition in time to correct it. Jimenez's unchallenged testimony that he personally saw overflow water pouring out from the bathroom above Fabian's immediately after the ceiling fell suffices to warrant summary judgment (*see Lozano v. Mt. Hope Place Props., Inc.*, 141 AD3d 455 [1st Dept] and *Figueroa v. Goetz*, 5 AD3d 164 [1st Dept]). Jimenez personally diagnosed the issue that he believes brought down the ceiling, one that was not caused or known by Memadet Realty. Absent any other condition that could have caused the ceiling collapse, Memadet Realty cannot be held liable for this incident.

In opposition, Fabian argues that Memadet Realty had notice of a stained and cracked bathroom ceiling and wall, raising material questions regarding its awareness of a hazardous condition in the bathroom prior to the incident that could have caused or contributed to the collapse. In support, Fabian notes certain of his deposition testimony that Memadet Realty omitted from its motion. Specifically, Fabian testified that he observed stains on the bathroom ceiling and wall approximately four to six weeks prior to the incident. The ceiling stain was about one foot and ranged from light to dark brown in color. The ceiling stains started as spots and got progressively larger and darker. The bathroom wall stain came from the top to the bottom of the wall, beginning less than one foot from the ceiling. Around the same time, Fabian noticed cracks on the bathroom ceiling and wall. The ceiling cracks were to the left of the stain on the ceiling and measured three inches and under. The crack on the wall was one foot long near the toilet. Fabian averred that he called Jimenez to complain about the stains and cracks in the bathroom some four to six weeks prior to the incident. Jimenez responded that he would check out the matter. Contrary to Jimenez' testimony, Fabian testified that Jimenez came to his bathroom some two to four weeks prior to the ceiling collapse, looked around, took notes, and left. He never returned to Fabian's apartment or repaired the ceiling prior to the ceiling collapse. After the ceiling had been repaired following the collapse, water stains again appeared in the bathroom, which has been painted again. Fabian continues to have water stains in the bathroom.

In addition, Fabian highlights that Jimenez testified that there was no policy of maintaining written records regarding tenant complaints and that no written records were kept of Jimenez' daily work activities. Finally, Fabian notes that Jimenez admitted to having taken photographs of the ceiling collapse and repair work but erased them at some point.

With this admissible evidence, Fabian has raised a triable issue of fact that precludes summary

judgment. In *Lozano v. Mt. Hope Place Properties, Inc.*, 141 AD3d 455 [1st Dept 2016], the Court held that the defendant property owner demonstrated that it did not have notice of defects in the subject ceiling, since it did not have “prior leaks or water staining” before the ceiling collapsed. Here, however, Fabian testified that he notified Jimenez of stains on the bathroom ceiling several weeks prior to the incident. Jimenez would not have made any ensuing repairs, since he admits that the only time that he had been in Fabian’s bathroom was after the collapse. If a trier of fact believes that Fabian notified Jimenez of these stains and Jimenez did not address them, the visible presence of these stains would have made Memadet Realty aware of a possible water or other hazard in Fabian’s bathroom that compromised the ceiling prior to the collapse. On a summary judgment motion the “court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility.” (*Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]).

For these reasons, the motion is denied.

The foregoing constitutes the Decision/Order of this Court.

DATED: January 18, 2022
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.