Alvarez v 219 Mulberry, LLC
2022 NY Slip Op 34201(U)
December 12, 2022
Supreme Court, New York County
Docket Number: Index No. 151786/2016
Judge: Dakota D. Ramseur
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR, *Justice* — PART 34M

INDEX NO. 151786/2016

MOTION DATE N/A

MOTION SEQ. NO. 003

ALICIA ALVAREZ,

Plaintiff,

- v -

219 MULBERRY, LLC,VINTAGE GROUP LLC,SIMONE BURKE

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion to/for JUDGMENT - SUMMARY.

In 2016, plaintiff Alicia Alvarez sustained personal injuries when she slipped and fell in an apartment owned by defendant 219 Mulberry LLC, managed by defendant Vintage Group LLC, and leased by defendant Simone Burke. Plaintiff commenced the instant action against the three defendants, asserting negligence causes of action against each. In 2017, plaintiff passed away and her husband, Jose Juraga, was appointed as the administrator of plaintiff's estate. Thereafter, this Court granted plaintiff's counsel's motion to substitute Juraga—as administrator of her estate—for plaintiff. In this motion sequence, Vintage Group and 219 Mulberry move pursuant to CPLR 3212 for summary judgment to dismiss the complaint. (Mot. Seq. 003.) Plaintiff opposes the motion, arguing that defendants have neither demonstrated entitlement as a matter of law or the absence of material issues of fact. For the following reasons, defendants' motion for summary judgment is granted and the complaint is dismissed.

BACKGROUND

Plaintiff, an Argentinian citizen, rented an apartment unit located at 219 Mulberry Street, New York, from Burke for seven days—from August 14 through August 21, 2014—through Airbnb. On August 16, plaintiff suffered a slip and fall as she was exiting the apartment's shower; she sustained a fracture to her left arm, as well as bruising and scaring to other areas of her body. At her deposition, plaintiff testified that: "I lifted my leg to get out and then I slipped with the right leg. It went backwards. And then I tried to hold on to the towel rack. The towel rack breaks, it comes off. It comes off the wall. It breaks and I fall to the floor." (NYSECF doc. no. 88, Alicia Alvarez Dep. Trans., at 48-49, 104-106.) Though plaintiff testified that she told her companion in the apartment about the slippery bathroom tub a day before she fell, she did not complain either to Burke or the other defendants.

In 2016, plaintiff commenced the instant action. In her amended complaint, she alleges that defendants owed her a duty to maintain the apartment in a reasonably safe condition but failed to do so. (*See* NYSCEF doc. no. 5, amended complaint.) More specifically, she asserts that (1) defendants knew from the premises' superintendent that the bathtub had a propensity to clog up, which, she alleges, made the area slippery and therefore created dangerous conditions; (2) 219 Mulberry and Vantage Group (after receiving actual and constructive notice of a problem from Burke several days prior) failed to properly repair the towel bar that plaintiff used to try and stop her fall; and (3) defendants failed to take measures to provide safe conditions such as providing bath mats or skid strips to the bathtub surface. Plaintiff argues that defendants' failure to address these dangerous conditions in the bathroom were the proximate cause of her injuries.

In May 2019, the Court granted plaintiff's motion to amend the caption to substitute Juraga as plaintiff for his deceased wife; in March 2022, plaintiff filed the Note of Issue with a demand for a jury trial; and in May 2022, defendants 219 Mulberry and Vantage moved for summary judgment pursuant to CPLR 3212. The Court heard the parties' respective positions on the motion at oral arguments held on November 29, 2022.

DISCUSSION

As owners and managers of the premise at 219 Mulberry Street, defendants 219 Mulberry Street and Vintage Group have a duty to maintain their property in a reasonably safe condition under existing circumstances. (*Basso v Miller*, 40 NY2d 233, 241 [1976].) To recover on a breach of this duty, plaintiff must demonstrate that defendants had actual or constructive notice of the dangerous conditions that precipitated, or proximately caused, her injury. (*See Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994].) Here, plaintiff has failed to raise a triable issue of fact—as she is required on a summary judgment motion under CPLR 3212—as to whether defendants had such notice and whether the alleged dangerous conditions caused her injuries.

In her complaint and motion papers, plaintiff asserts that defendants had actual or constructive notice of two dangerous conditions—the slippery bathtub and the defective towel holder. (NYSCEF doc. no. 101 at 15-16, plaintiff's mem. of law.) Plaintiff cites to the deposition testimony of superintendent Frank Torredelfino for support. He recalled that at some point in 2013, 2014, or 2015—when replacing bathroom tiles—he saw that the bathtub had a "ring around [it] from soap." He attributed the soap ring to "when you don't clean the tub—when you take a shower, you don't clean the tub, you don't wash the tub after, it's going to get dirty. It was dirty around the edges." [1](NYSCEF doc. no. 97 at 186-187, Torredelfino Dep. Testimony) According to plaintiff, Torredelfino's visit to the apartment—though made at an indefinite time prior to her visit—provided defendants with notice of the bathtub's propensity to clog and its dangerous slippery surface. (*Id.*)

[1] According to his testimony, Torredelfino also ran the faucet and found that, even with the dirt surrounding the drain, the water went down. There is no allegation that standing water created the slippery surface that plaintiff noticed. As such, there is certainly no evidence that defendants had actual or constructive knowledge of a dangerous condition arising from any standing water that might have made the tub slippery. (*See Beltre v Heights Mgt. Co., LLC*, 55 AD3d 350, 350 [1st Dept 2008]; *Seaman v State of New York*, 45 AD3d 1126, 1127 [3d Dept 2007].)

The problem, aside from the question of how far removed Torredelfino's visit was from plaintiff's stay, is that defendant Burke, in unrefuted testimony, described how the bathtub did not have a propensity to clog or overflow, that she had never noticed or complained about such a problem before (NYSCEF doc. no. 77 at 88-89, Burke Dep. Testimony), and that she cleaned the apartment, bathroom, and anything else that was dirty before plaintiff arrived. (*Id.* at 47.) In this respect, Burke's testimony is significant on two levels. First, it demonstrates that defendants did not have notice of this dangerous condition. In *Irizarry v 15th Mosholu Four, LLC* (806 NYS2d 534, 535 [1st Dept 2005]), the First Department held that the defendant-landlord had constructive notice of a "recurring condition dangerous condition" as the adduced evidence indicated that the subject staircase was generally unclean and contained accumulated litter. In contrast, here, Burke's testimony refutes the notion that the condition of the tub was a recurring dangerous condition that 219 Mulberry, Vintage Group, or Burke left unaddressed. Second, since plaintiff did not attribute the slipperiness of the bathtub to the type of soap ring Torredelfino discovered (nor attribute the slipperiness to any other cause), Burke's testimony—that she cleaned the bathtub before plaintiff's stay—eliminates the condition the bathtub was in when Torredelfino visited as a proximate cause of her injury. (*See Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325 [1st Dept 2006] ["absent proof of the reason for plaintiff's fall other than the 'inherently slippery' condition of the floor, no cause of action for negligence can properly be maintained"; *Kruimer v Nat'l Contrs., Inc.*, 256 AD2d 1,1 [1st Dept 1998]; *Wasserstrom v New York City Transit Auth.*, 267 AD2d 36, 37 [1st Dept 1999] [holding that the court properly granted summary judgment motion where plaintiff only alleged that floor was "inherently slippery" and had not shown that defendants had caused water to accumulate on the floor.])

The caselaw that plaintiff presents does not rebut the conclusions described above. In *Kolb v Lambert* (116 AD3d 492, 492 [1st Dept 2014]), the alleged dangerous conditions had existed for several days immediately prior to the plaintiff's injury and the owner had visited the premise during that time frame. Both *McGrew v V.V. Bldg. Corp.* (306 AD2d 131 [1st Dept 2003]) and *Nyambuu v Whole Foods Mkt. Group* (191 AD3d 580, 580 [1st Dept 2021]) are cited for the proposition that defendants are required to show they undertook reasonable periodic inspections to prevent the dangerous conditions from accruing. Yet neither case is related to residential tenants and slip and fall accidents; instead, both involve a duty on the part of commercial entities to ensure that large objects—in one, the letters of the company's sign; in the other, an awning above an entranceway—do not fall from the sides of their respective buildings. The Court is not aware of any requirement that an apartment owner, in the absence of complaints from tenants, periodically inspect the conditions of their residential tenant's bathrooms.

Plaintiff also alleges that defendants' failure to properly repair the towel rack that she leaned on to prevent her fall created or exacerbated the premises' dangerous conditions. As both Burke and Torredelfino testify, several days prior to plaintiff's stay, Burke communicated to Vintage Group that the towel rack was wobbly or a little loose and needed to be repaired. Both parties acknowledge that Torredelfino made repairs to the towel rack. However, since the towel rack gave way shortly thereafter, plaintiff maintains that there are issues of fact as to whether the repairs Torredelfino made were defective. In support, plaintiff cites to *Bamrick v Orchard Brooke Living Ctre.* (5 AD3d 1031, 1031-1032 [4th Dept 2004].) There, the defendant—an assisted living facility—argued on its summary judgment motion that it was not liable for creating a defective or dangerous condition by installing a towel bar that eventually gave way in

a slip and fall. (*Id.*) The court rejected the argument, noting that it was not clear whether the defendant had complied with several New York State Department of Health regulations. (*Id.*) Critically, the court noted that the evidence indicated that the assisted living facility did not install the towel bar in question in accordance with custom in the industry, i.e., so securely as to ensure it could withstand use as a "steadying device." (*Id.*) The court concluded that even assuming defendants had complied with the regulations, "'such compliance does not necessarily preclude a jury from finding that the... [towel bar] was part of or contributed to any inherently dangerous condition.'" (*quoting Eisenhart v The Marketplace*, 176 AD2d 1220, 1220 [4th Dept 1991].) (*Id.*)

Bamrick, however, is of limited applicability to plaintiff's present argument. No similar regulations on installing or maintaining towel bars apply to residential apartments, and there is certainly no similar industry custom that requires a towel bar to withstand use as a steadying device. Even the Fourth Department's quotation of *Eisenhart* is of limited value. The court appears only to say that, assuming the assisted living facility complied with the regulations (even though it did not install towel bars secure enough to withstand steadying weight), it may still be liable because, under a negligence theory, the facility *should* have installed a more secure towel bar. *Bamrick* only stands for the ordinary proposition that compliance with applicable regulations is not dispositive of whether a defendant is liable for negligence. (*See Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532 [4th Dept 2012], citing *Bamrick*, 5 AD3d at 1032.) The clear implication of *Bamrick*, then, is that the circumstances of a slip and fall in assisted living communities, and relatedly what the negligence standard requires of such living communities, is different, and stricter, than in the context of residential apartments. From the Court's perspective, whether such a towel bar can constitute negligence in the assisted living facility context is inconsequential to the instant matter, particularly so given plaintiff does *not* argue that defendants were under a duty to install towel bars that can withstand steadying weight. It should also be noted that plaintiff does not provide any evidence that the towel rack was improperly repaired other than its giving way under her weight. In contrast to *Negri v Stop & Shop* (65 NY2d 625, 626 [1985]), which plaintiff cites in support, plaintiff has not described any "circumstantial evidence" to permit the jury to draw the inference that the towel rack was improperly repaired. The evidence of defective repair, as described above, consists solely of the accident itself.

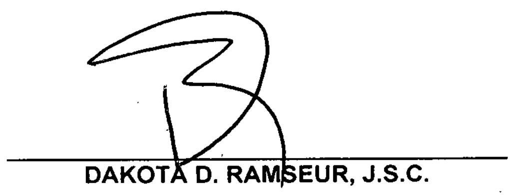
These considerations, taken together, demonstrate that plaintiff *cannot* show that Torredelfino's alleged faulty repairs proximately caused, or contributed to, plaintiff's injuries. If, as the Court describes above, defendants have demonstrated they did not create dangerous conditions with respect to the bathtub itself (meaning plaintiff cannot argue the faulty repairs *exacerbated* other existing conditions), and plaintiff does not argue that defendants are under an obligation to install weight-bearing towel racks, then—even *assuming arguendo* that the repairs performed by Torredelfino were in fact defective—the repairs themselves were not, and *cannot*, be a proximate cause of plaintiff's injuries. Put slightly differently, plaintiff would have suffered the same injuries regardless of Torredelfino's repairs given that towel bars are not designed or installed to support the amount of weight that plaintiff (quite understandably) put on it. As defendants argue, the case that plaintiff has asserted lacks evidence of their negligence, either as to the condition of the tub causing her fall in the first place, or as to the defective repairs of the towel bar that was not designed or intended to support plaintiff's weight.

Lastly, defendants have demonstrated that no cause of action lies under either plaintiff's res ipsa loquitur theory or for defendant Burke's code violations with respect to allowing Airbnb guests to stay at her apartment. As to the res ipsa loquitur doctrine, a plaintiff must demonstrate (1) the event or injury is the kind which ordinarily does not occur in the absence of negligence, (2) it was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) it was not due to any voluntary action or contribution on the part of the plaintiff." (*Wilkins v West Harlem Group Assistance, Inc.*, 167 AD3d 414, 415 [1st Dept 2018].) At the very least, plaintiff has not established the first element. Cases like *Waiters v Northern Trust Co. of N.Y.* (29 AD3d at 325) and *Kruimer v Nat'l Contrs., Inc.* (256 AD2d at 1)—which hold that a plaintiff recovering on a negligence cause of action must provide a reason for their slip and fall beyond just an "inherently slippery" surface—demonstrate that slip and falls are precisely the type of events that *do* occur in the absence of negligence. Plaintiff has not cited any cases to suggest that a plaintiff may use the res ipsa loquitur doctrine in a slip and fall accident. As to Burke's violation of a provision of New York's Multiple Dwelling Law that prohibits owners of certain buildings from renting apartment units on a short-term basis, plaintiff has not demonstrated how Burke renting out her apartment to other Airbnb guests proximately caused her injuries. As discussed above, Burke testified that she cleaned the apartment unit after other guests had stayed in the apartment and before plaintiff's stay. As such, defendants have demonstrated entitlement to summary judgment as a matter of law and plaintiff has not raised issues of fact which would preclude it.

Accordingly, it is hereby

ORDERED that defendants 219 Mulberry LLC and Vintage Group LLC's motion for summary judgment under CPLR 3212 is granted and plaintiff Alicia Alvarez's complaint is dismissed; and it further

ORDERED that counsel for defendants service a copy of this order, along with notice of entry, on all parties with ten (10) days.



12/12/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION
	X	GRANTED	☐	DENIED		GRANTED IN PART ☐ OTHER
APPLICATION:	☐	SETTLE ORDER				SUBMIT ORDER
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT ☐ REFERENCE