

Perez v New York City Hous. Auth.
2022 NY Slip Op 35091(U)
May 18, 2022
Supreme Court, Bronx County
Docket Number: Index No. 31754/2017E
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26-----X
ROSAURA PEREZ,

Index No.: 31754/2017E

Plaintiff,

-against-

DECISION/ORDER

NEW YORK CITY HOUSING AUTHORITY,

Defendants.
-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of the motion as indicated below:

Papers	Numbered
Notice of Motion & Affirmation in Support & Exhibits.....	1

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The Plaintiff commenced this action for personal injuries she allegedly sustained on September 12, 2016 while closing a window at an apartment located at 694 East 149th street, in the County of the Bronx, City and State of New York (hereinafter "the Premises"). Plaintiff was visiting her sister who lived at the Premises when the accident allegedly occurred. Plaintiff's sister claims that the Premises had a window that would not stay up, and that when Plaintiff attempted to close it, a pane of glass slid down suddenly crushing Plaintiff's hand. Defendant now seeks summary judgment alleging that Defendant did not have actual or constructive notice of and did not create the defect. Plaintiff opposes the motion.

Plaintiff alleges that while she was in the Premises, a window malfunctioned, causing "permanent injuries" to her hand. Plaintiff's verified bill of particulars indicates that the injury occurred when the window collapsed, causing numerous crush injuries to Plaintiff's right hand, and that said negligence involved Defendant having actual and constructive notice of the

defective building condition. The bill of particulars indicates that the Defendant "created" the defect.

Defendant argues in an affirmation submitted by counsel and statement of material facts that the New York City Housing Authority (hereinafter "NYCHA") had no actual or constructive notice about the defective window. These documents, by an individual with no personal knowledge of the facts, are supported by two evidentiary documents: the affidavit of Abe Alex, and a record of New York City Housing Authority repair tickets regarding the Premises. Defendant claims in the statement of material facts that all housing facility complaints are logged in NYCHA's "MAXIMO" computer system, a statement supported by the affidavit of Mr. Alex, the property manager for NYCHA's Castle Hill development. Mr. Alex also states in his affidavit that a search of MAXIMO reveals no records of complaints or requests for repair for the subject premises. This latter assertion is supported by the MAXIMO search results.

In her affirmation in opposition, Plaintiff claims that her sister, who was a tenant in the apartment knew of the defective window, made numerous calls to have it fixed, and that NYCHA was unreceptive to these attempts. In opposition to the motion she submits an affidavit from Maria Polanco. Ms. Polanco states in her affirmation that she called NYCHA multiple times to complain about the malfunctioning window beginning in June of 2016. The Plaintiff claims that MAXIMO only includes requests for repair where a work ticket is generated, and does not record all complaints.

On a motion for summary judgment, the burden is on the movant to present evidentiary facts to establish its cause sufficiently to entitle it to judgment as a matter of law (*Mazurek v. Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). The court's function is issue finding and not issue determination on a motion for

summary judgment (*Pantote Big Alpha Foods, Inc. v. Schefman*, 121 AD2d 295, 296, [1st Dept 1986]). In the premises liability context, the movant defendant must show that it "neither created the allegedly dangerous condition, nor had actual or constructive notice thereof," (*Mazerbo v. Murphy*, 52 AD3d 1064, 1065 [3d Dept 2008]). Constructive notice occurs where "defendant should have known of the defective condition by reason of its manifest nature and the length of time it was in existence prior to the accident[.]" (*Schiano v. TGI Friday's, Inc.*, 205 AD2d 407 [1st Dept, 1994]). "In the case of actual or constructive notice, plaintiff must also show that the owner had a sufficient opportunity, with the exercise of reasonable care, to remedy the situation[.]" (*Smith v. Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]).

Clearly issues of fact exist with respect to whether Defendant had notice of the alleged defective window. The affidavit of Ms. Polanco raises a question of fact for the jury to determine whether NYCHA had constructive notice of the defective condition. There is a question regarding whether Defendant received actual or had constructive notice of the defective window (*Schiano*, supra at 407). There is also a question regarding whether Defendant had sufficient opportunity, with the exercise of reasonable care, to remedy the window situation (*Smith*, supra at 500).

The cases relied on by Defendant to support its argument are distinct from the instant case. Each of these cases involved the malfunction of an elevator. In *Vilella v. Witkoff Group, LLC* (150 AD3D 483 [1st Dept 2017]), the court reversed a denial of summary judgment where no work ticket for the alleged defect had been logged, and no evidence of other complaints had been established. Similarly in *Narvaez v. New York City Housing Authority* (62 AD3d 419 [1st Dept 2009]), an award of summary judgment was affirmed as no evidence was shown of work tickets, records or statements indicating that a repair was necessary. Defendant's motion for summary judgment is therefore is denied.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the defendant's motion for an order awarding summary judgment pursuant to CPLR § 3212 is denied, and it is further,

ORDERED AND ADJUDGED, that the defendant shall serve a copy of this decision and order upon the plaintiff within twenty (20) days of notice of entry.

This constitutes the Decision and Order of the court.

Dated: May 18, 2022

A handwritten signature in black ink, appearing to be 'Paul L. Alpert', written over a horizontal line.

Hon. Paul L. Alpert, J.S.C.