

Barnhart v 24/35 Hillside Assoc. LLC

2023 NY Slip Op 31588(U)

May 11, 2023

Supreme Court, New York County

Docket Number: Index No. 159092/2019

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LORI S. SATTLER **PART** **02TR**

Justice

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TYEST BARNHART,

Plaintiff,

- v -

24/35 HILLSIDE ASSOCIATES LLC, PINNACLE GROUP
NY LLC

Defendant.

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INDEX NO. 159092/2019

MOTION DATE 02/06/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 48, 49, 50, 51, 52, 53, 54, 55, 56, 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

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

In this premises liability action, defendants 25/35 Hillside Associates LLC (“Hillside”) and Pinnacle Group NY LLC (“Pinnacle Group”) (collectively “Defendants”) move for an order granting summary judgment pursuant to CPLR 3212 dismissing plaintiff Tyest Barnhart’s (“Plaintiff”) Verified Complaint with prejudice. Plaintiff opposes the motion and cross moves pursuant to CPLR 3212 for summary judgment against Defendants on the issue of liability. Defendants oppose the cross motion.

Plaintiff is a tenant at the apartment building located at 35 Hillside Avenue, New York, New York (“the building”). Hillside owns the building and Pinnacle Group is allegedly its managing company. Plaintiff alleges that she suffered personal injuries caused by a water leak in her apartment’s bathroom on September 12, 2018. In her Verified Bill of Particulars, she alleges that a water leak caused her bathroom ceiling to collapse; the debris from the ceiling allegedly struck her and she was then caused to fall (NYSCEF Doc. No. 54, Bill of Particulars at 2). In her deposition, Plaintiff claims that she slipped on water that had leaked from the bathroom ceiling

(NYSCEF Doc. No. 55, Plaintiff EBT at 31-42). Plaintiff was hospitalized as a result of her alleged injuries and testified that the bathroom ceiling collapsed while she was in the hospital. Both Plaintiff and the building super testified that the cause of the water leak, a broken pipe, was discovered after the accident and ceiling collapse (*id.* at 84-85; NYSCEF Doc. No. 58, Toskic EBT at 31).

Plaintiff testified that water leaks had occurred in her bathroom ceiling since Christmas 2015, when she first noticed bubbling paint and leaking water (Plaintiff EBT at 42-43). She reported this issue to the building super, who she says repaired the damage by bursting the paint bubble and draining the water (*id.* at 44). Plaintiff testified that she was told that this first leak was caused by an upstairs neighbor's bathtub (*id.* at 42-44).

Further water damage to the bathroom ceiling purportedly occurred every two to three months from late 2015 through March 2018. Plaintiff contends that she notified the building about the damage multiple times, although not all of her complaints received a response (*id.* at 56-60). On at least two occasions, in March 2016 and March or April 2018, Plaintiff states that the building super repaired water damage on the ceiling by scraping off bubbling paint and plastering over the leaking portion of the ceiling (*id.* at 53, 56-62). The building super did not provide any testimony about these alleged prior water leaks.

Defendants now move for summary judgment dismissing the Verified Complaint, and Plaintiff cross moves for summary judgment on its causes of action. On a motion for summary judgment, a movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). After the movant makes this showing, “the burden shifts to the party opposing the motion . . . to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact” such that trial of the action is required” (*id.*). The Court must view the facts “in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Defendants first argue that they are entitled to summary judgment because the pleadings fail to allege the theory she advances in the instant motion. They claim that the Verified Complaint and Bill of Particulars allege that Plaintiff was injured by falling debris from her bathroom ceiling, while her motion papers claim that she was injured by slipping on the floor. This argument is unavailing as Plaintiff does not attempt to advance a different theory of causation in her moving papers than that in her pleadings. The essence of her claim is that she was injured due to a water leak in her bathroom ceiling; her Verified Bill of Particulars says that she fell because of the water leak, an account that aligns with her deposition in which she testified that she slipped on water that had leaked from the ceiling.

Defendants next argue that they are entitled to summary judgment because there is no dispute of fact as to their lack of actual or constructive knowledge of a dangerous condition in Plaintiff’s apartment. They argue that Plaintiff was not aware of a water hazard on her bathroom floor until she slipped, the building super was not aware of prior complaints about plumbing leaks in the apartments above Plaintiff’s, and that any general awareness they may have had about past leaks is insufficient to raise a notice issue about the leak that allegedly caused Plaintiff’s accident. In opposition, Plaintiff contends she is entitled to summary judgment as there is no dispute as to whether Defendants had notice of a recurring water leak in her bathroom ceiling.

A property owner owes a duty to exercise reasonable care in maintaining its property in a reasonably safe condition under the circumstances (*Powers v 31 E 31 LLC*, 24 NY3d 84, 94

[2014]; *Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). A defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous or defective condition or did not have actual or constructive knowledge of the condition (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012]). In opposition, a plaintiff may satisfy its burden by presenting “evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord” (*Talavera v New York City Transit Auth.*, 41 AD3d 135, 136 [1st Dept 2007], quoting *O’Connor-Miele v Barhite & Holzinger*, 234 AD2d 106, 106-107 [1st Dept 1996]).

This branch of Defendant’s motion and Plaintiff’s cross motion are denied. The Court finds that there are material issues of fact as to whether Defendants had notice of the dangerous condition – a water leak in the bathroom ceiling – that allegedly caused Plaintiff’s injuries. Although it is undisputed that Plaintiff previously complained to the super and building management about a recurring water leak in her bathroom ceiling in the three years before her accident, Plaintiff’s testimony indicates that the super had attributed at least two causes to the various leaks. The first, in late 2015, was purportedly caused by an upstairs bathtub, while the September 2018 leak was apparently caused by a burst pipe discovered only after Plaintiff’s accident. The record does not contain any information about the cause of the leaks that allegedly occurred every two to three months from late 2015 to March 2018. Moreover, Plaintiff avers that there were no leaks between March and September 2018, which creates a further question as to whether the leak that led to her injury was caused by the same recurring issue as prior leaks.

Finally, Defendants, who are jointly represented, argue in the alternative that summary judgment should be granted dismissing the Verified Complaint as against Pinnacle Group because it has no connection to the premises. Defendants submit an affidavit from Pinnacle

Group’s managing member, Joel Wiener, stating that Pinnacle Group has no connection to the premises and that it has never employed the current super, Rasim Toskic (NYSCEF Doc. No. 59). However, Toskic testified that he had been employed by a company called “Pinnacle” for 29 years (Toskic EBT at 8). Both Hillside, the building’s owner, and Pinnacle Group, in their jointly submitted papers, fail to provide any information identifying the building’s management company as an entity other than Pinnacle Group. They also fail to demonstrate that Toskic was employed by a different company named “Pinnacle.” The unsupported and conclusory affidavit of Pinnacle Group’s managing member is insufficient to sustain Defendants’ burden of establishing a prima facie case regarding Pinnacle Group’s alleged non-involvement with the building. Therefore, this branch of Defendants’ motion is denied.

Accordingly, it is hereby:

ORDERED that Defendants’ motion is denied; and it is further

ORDERED that Plaintiff’s cross motion is denied.

This constitutes the Decision and Order of the Court.

5/11/2023
DATE



LORI S. SATTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE