

**Rosario v HP 680 St. Nicholas Hous. Dev. Fund Co.,
Inc.**

2024 NY Slip Op 33363(U)

September 23, 2024

Supreme Court, New York County

Docket Number: Index No. 159640/2022

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 159640/2022

MAGALY ROSARIO,

MOTION DATE 03/05/2024

Plaintiff,

MOTION SEQ. NO. 002

- v -

HP 680 ST. NICHOLAS HOUSING DEVELOPMENT FUND COMPANY, INC., FAIRSTEAD MANAGEMENT LLC

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 85, 86, 87, 88, 89, 90, 91 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents submitted by Michael J. Glidden, Esq. on behalf of Defendants HP 680 Nicholas Housing Development Fund Company, Inc. ("680 HDFC") and Fairstead Management, LLC ("Fairstead") (collectively "Defendants") and by Brett A. Zekowski, Esq. on behalf of Plaintiff Magaly Rosario ("Plaintiff"), and after a final submission date of July 18, 2024, Defendants' motion for summary judgment dismissing Plaintiff's Complaint is denied.

I. Background

This is an action for personal injuries that Plaintiff allegedly sustained on September 28, 2021 at 10:45 a.m. when she fell walking downstairs in the building she resides at 680 Nicholas Street, New York, New York (the "Premises"). Plaintiff alleges that the stairs were broken which caused her to fall (NYSCEF Doc. 37 at 33). Jennifer Lau, a regional manager employed by Fairstead, testified that if she had observed the defect on the stairs she would have instructed it to be repaired and replaced immediately (NYSCEF Doc. 68 at 61). She further testified she considered it to be a trip hazard (id. at 75). The superintendent of the Premises, Skailat Alejo,

testified that the top stair was missing a tread and he notified his manager who instructed him to order a new tread (NYSCEF Doc. 69 at 34). Plaintiff allegedly fell while the newly ordered tread was being shipped to Mr. Alejo.

Defendants move for summary judgment on the grounds that the defect in the stair was open and obvious and was not inherently dangerous. Defendants argue that the defect on the stair was readily observable, and Plaintiff had frequently traversed the stairs prior to her fall. Plaintiff opposes and argues that the condition on the stairs violates numerous statutes and codes. Plaintiff submits the expert affidavit of William Marletta, Ph. D. (NYSCEF Doc. 66), who opined those defects in the tread caused Plaintiff to fall. Dr. Marletta cites to numerous provisions of the New York City Building Code which the defective tread violated. Plaintiff further argues that simply because a hazard is visible does not make it open and obvious, and therefore Defendants are not entitled to summary judgment. In reply, Defendants submit that Plaintiff's expert engineer should be disregarded as his opinions are speculative and conclusory.

II. Discussion

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, 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 which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of

law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

Viewing the facts in the light most favorable to the non-movant, the Plaintiff, the Court finds there are issues of fact as to whether the tread was open and obvious or inherently dangerous. As a preliminary matter, there is an issue of fact as to whether the stairs were inherently dangerous as Defendants' own witness, Ms. Lau, testified that she would have instructed the missing tread to be repaired immediately because it represented a tripping hazard. Moreover, as held by the First Department there exists a "well established principle that a finding of "open and obvious" as to a hazardous condition is never fatal to a plaintiff's negligence claim. It is relevant only to plaintiff's comparative fault." (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 90 [1st Dept 2011]). Thus, even if this Court were to find that the missing tread was open and obvious, it would not dispose of Plaintiff's case, especially where Defendants' own witness identified the missing tread as a tripping hazard (*see also Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72-73 [1st Dept 2004]). Indeed, the First Department has recently reiterated that the open and obvious nature of a hazard pertains to a landowner's duty to warn of the danger but does not eliminate a claim that the landowner breached its duty to maintain the premises in a reasonably safe condition by failing to eliminate the hazardous condition (*Perry v Sada Three, LLC*, 222 AD3d 498 [1st Dept 2023]). Therefore, Defendants' motion for summary judgment is denied.

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Accordingly, it is hereby,

ORDERED that Defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/23/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE