Medina v 217 LLC

2024 NY Slip Op 34701(U)

October 8, 2024

Supreme Court, Bronx County

Docket Number: Index No. 300254/2017E

Judge: Elizabeth A. Taylor

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

----------X

BRENDA MEDINA,

Plaintiff,

-against-

217 LLC,

Defendant.

----------X

Index №. 300254/2017E

Hon. **Elizabeth A. Taylor**,
Justice Supreme Court

The following papers numbered ____ to ___were read on this motion (**NYSCEF Seq. No. 5**) for noticed on _____and duly submitted as **Nos.** __ on the Motion Calendar of _____

Sequence	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	76-102
Answering Affidavit and Exhibits, Memorandum of Law	104-107
Reply Affidavit	108-115

Upon the foregoing papers, the defendants' motion for summary judgment is decided in accordance with the annexed decision and order.

Dated: OCT 08 2024

Hon. _____
Elizabeth A. Taylor, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY **X CASE STILL ACTIVE**
2. MOTION IS..... ☐ GRANTED **X DENIED** ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

----------X

BRENDA MEDINA,

Plaintiff,

DECISION and ORDER
Index No. 300254/2017E

-against-

217 LLC,

Defendants.

----------X

Elizabeth A. Taylor, J.

Defendant moves for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff opposes the motion.

FACTS AND ARGUMENT

Plaintiff, a home health aide for a resident of defendant's building located at 221 West 233rd Street in Bronx County, was allegedly injured on November 15, 2016, when she slipped on water at the fifth-floor landing outside of her client' apartment. The building is a five-story walkup apartment with (62) sixty-two dwelling units. According to the plaintiff's deposition testimony, her client, Ms. Mendez, lived on the fifth floor of the walk-up building. It had rained the previous day, as well as on the day of the accident. Plaintiff testified that she had discussed the presence of water on the landing with the super's helper the day before the accident. She testified, "We [plaintiff and the super's helper] were talking about the fact the woman [Ms. Mendez] mentioned it was raining, to watch and remember that there was always water there, and that she wasn't going to stand that anymore…There was always paint blisters accumulating on the ceiling on the roof, and they would cause water to come down."

Plaintiff testified that she arrived at the building on the morning of the accident at approximately 8:00 AM, but did not observe any water leaking on the stairway or landing. At approximately 11:45 AM. she left the Mendez apartment to buy groceries for her client. Plaintiff walked four steps toward the stairway, and was directly in front of the stairs, when she slipped.

She did not observe any water before she fell. She fell backward, and down the stairway, landing on the second step from the top. She then realized that the hallway floor and the stairway were wet. She also observed that water was leaking from the ceiling.[1]

Plaintiff did not see the water dripping from the ceiling except after the accident. She did notice that water was present on the walls in the hallway the day prior to the accident. She claimed that after she fell, she observed that the water on which she slipped came from a light fixture in the ceiling over the landing, from which water was streaming and had accumulating in a small puddle near the steps. Ms. Mendez advised the plaintiff that she had notified management many times over the years that the landing became wet after rain.

According to the affidavit of defendant's expert engineer, Mark Marpet, who examined the premises on October 6, 2021, there was no evidence of wall or ceiling discoloration, paint blisters, or any evidence of water infiltration, on the walls, roof stair and skylight.

Angel Zepeda, an employee of PK, testified that in November 2016, Jesus Martinez was the building superintendent. He testified that he himself would arrive at the subject building at 8:00 AM each weekday morning, spend 45 minutes checking the building, and then go on to other duties at other buildings owned or managed by PK. He testified that on the morning of the accident, he was at the building at 8:00 AM and did not observe any standing water or leaks. He did not speak to the plaintiff prior to the accident, but he did speak to her the next day, when she claimed to have fallen due to a water condition. No tenant, including Mendez, ever complained of water in the stairwell.

The affidavit of Costas Kreatoulas, a member of non-party PK Mgmt LLC (hereinafter, "PK"), avers that PK is the managing agent of the building. There was no written agreement between the defendant owner and PK. Kreatoulas further states that a new skylight was installed over roof

[1] Plaintiff testified that her client's nephew assisted her to get up after her fall, but that he has since died.

bulkhead by apartments K, J, L, and I in 2012. No complaints of leaks were made pertaining to the area before or after the installation of the skylight.

In opposition, plaintiff submits the affidavit of Vincent Pici, PE, who inspected the area where the plaintiff allegedly fell on June 10, 2021. Pici also inspected the stair leading from the fifth-floor landing to the roof bulkhead door, the roof access door and the roof mounted skylight located directly above the landing at issue in this case. He states that photographs taken at the time of my inspection that the roof bulkhead door was not weathertight, and that he was able to observe areas and conditions that indicated that the roof top termination of the stairwell was not weathertight, and that water and moisture would be able to enter the building at this area. Rainwater entering the upper portion of the stair well would then drain by gravity along the stair, wall and ceiling surfaces and eventually drip onto and collect on the fifth-floor landing in the area that Ms. Medina identified. He observed wall finish discoloration, with signs of water damage throughout the upper areas of the stairwell directly beneath the skylight. He states:

> "At the time of my inspection there were visible signs of rust colored staining in the corner of the walls as well as indications of water damage and patching of the wall surface of the upper stair enclosure as illustrated in Site Visit Photos #4 and 5. In addition to the wall area of spot wall surface repairs and repainting were visible on the 5 2 floor ceiling, as shown in Site Visit Photos #6 & #7 below. Based on my comparison of the area depicted in Site Visit Photo #6 & #7 and Attorney Photo #2, taken on or about the time of the accident, it is my opinion that between the time of the accident and my site visit additional water damage and surface repairs were done to the area of the ceiling directly above the area on the landing where the puddle of water formed. It can be reasonably assumed that additional repairs and painting may have been undertaken during the four-month period between my site visit and Mr. Marpet's visit."

In reply, defendant's expert Marpet states that he did not see evidence of any water damage in photographs taken by plaintiff's expert on June 10, 2021. He asserts that "Site Visit Photo 4" and "Site Visit Photo 5" are of poor quality and are not enhanced to illustrate any water damage in the stucco near the skylight/roof. He concludes that there is no evidence of water related damage to the upper stair enclosure or area near the roof/skylight, and no evidence that the building

conditions, such as the roof door, door frame, cement stucco, exterior bulkhead walls, and aluminum gutters contributed to the alleged accident.

ARGUMENT

Defendant now argues that:

(1) defendant did not cause or create the alleged defective condition, and did not have notice of same. In this regard, defendant points out that plaintiff admitted she did not make prior complaints regarding the alleged leak from the light fixture at the fifth-floor landing, and she never saw a leak from the light fixture prior to the alleged accident. Plaintiff's statements as to what other people said regarding the alleged leak, defendant argues, constitute inadmissible hearsay with no exception to the hearsay rule;
(2) defendant cannot be held responsible for the negligence of an independent contractor who allegedly negligently installed the defective skylight;
(3) defendant was an out of possession landlord with no responsibility to maintain the subject remises, and plaintiff s alleged defective condition is not a significant structural defect in violation of any statute;
(4) plaintiff's purported liability expert's opinion should be precluded as speculative;
(5) plaintiff's alleged statutory violations should be dismissed as such allegations are devoid of merit. Defendant argues inter alia, that Plaintiff's alleged violation of Title 27, Chapter 2, §27-2005, states the "owner of a multiple dwelling shall keep the premises in good repair." At the outset, no specific version of §27-2005 is alleged. Like the above, this alleged statutory violation should be dismissed because the evidence submitted established there was no notice to any alleged prior defect, no evidence the building was in disrepair, and no evidence such alleged violation was the proximate cause of the alleged accident.[2] Similar arguments are raised as to the other statutory violations argued by the plaintiff in her bill of particulars.

Plaintiff argues, in opposition, that the evidence that defendant submitted failed to eliminate a triable issue of fact as to whether it had notice of the dangerous condition. Moreover, plaintiff contends that there is no merit to defendant's contentions that it cannot be held liable because an independent contractor installed the skylight or that it was an out-of-possession landlord; neither of those defenses are applicable to the facts of this case. Plaintiff also argues that defendant's contention that the opinion of plaintiff's expert should be precluded, or that the statutory violations

[2] The Court notes that Administrative Code of the City of New York §§ 27-127 and 27-128 were repealed and recodified in substantially similar form as Administrative Code § 28-301.1. Those provisions set forth a general duty of maintenance and repair which are insufficiently specific to impose liability on an out-of-possession landlord

Sapp v S.J.C. 308 Lenox Ave. Family Ltd. Partnership, 150 A.D.3d 525, 528, 56 N.Y.S.3d 32, 35-36 (1st Dept. 2017).

should be dismissed, are equally without merit. Accordingly, plaintiff argues, the burden should not shift to plaintiff to raise a triable issue of fact, and even if it does, plaintiff has raised a triable issue of fact by submitting the expert affidavit of Vincent Pici, P.E.

DISCUSSION

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. To recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury. (Piacquadio v Recine Realty Corp., 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994].) "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (Smith v Costco Wholesale Corp., 50 AD3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]). "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." (Mei Xiao Guo v. Quong Big Realty Corp., 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 [2d Dept. 2011] [citations omitted]; Quintana v. TCR, Tennis Club of Riverdale, Inc., 118 A.D.3d 455, 987 N.Y.S.2d 68 [1st Dept. 2014] [defendant failed to establish a lack of constructive notice of the wet condition on steps where the moving papers contained no indication of when the area was last inspected prior to the accident]; Qevani v 1957 Bronxdale Corp., 232 AD2d 284, 649 NYS2d 11 [1st Dept. 1996] [issue of fact as to whether existence of condition on steps for 90 minutes constituted constructive notice].)

The defendant argues that it is an out-of-possession owner. An out-of-possession landlord is not generally liable for injuries that occur on the premises unless the landlord has retained control over the premises, or over the operation of the business conducted on the property. (Vicchiarelli v. Cold Spring Hills Realty Co., LLC, 2018 N.Y. App. Div. LEXIS 5499, 2018 NY Slip Op 05619 [2d Dept. 2018] [out-of-possession landlord was not liable for fall on "black ice" in parking lot of premises where lease provided that the maintenance of the entire premises, including the parking lot, was the responsibility of tenant]). Absent a duty to repair, liability may be found when an out-of-possession landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation (or a violation of the New York City Administrative Code) exists.

In the cases cited by defendant, however, the defendant was not in possession because the defendant had leased the premises to a third party. Here, the defendant has not leased the building unit, or legally conveyed control or possession to a third party. While PK as managing agent controls day-to-day operations, and hires the superintendent and helpers, there is no written contract. Defendant has not established any other terms of the agreement between defendant and PK. There is no explanation as to how and when PK reports to the defendant, nor any showing that defendant is barred from exercising control over the premises in conjunction with PK. There is also no showing that the owner cannot overrule any decision regarding the premises made by PK. Even if the owner were somehow barred from exercising control over its own premises by virtue of an agreement with PK, which has not been established, the fact that an owner may choose not to exercise control over its property does not equate with a legal relationship under which the owner is no longer in possession.

The defendant argues that it had no notice of a water condition or leak on the fifth floor. Assuming that the defendant established the absence of notice through the testimony of the managing agent, who affirmed that there had been no actual or constructive notice of water leaks,

and the helper, who testified that no water was observed at 8:00 AM on the morning of the accident, the plaintiff has raised an issue of fact as to notice in opposition. First, the plaintiff has raised an issue as to a long history of complaints by Mendez and her nephew. While plaintiff's testimony of these complaints is hearsay, Mendez herself, Zepeda testified, had moved to a care facility, and no one disputes that the nephew died. "Plaintiff, as the party opposing summary judgment, 'may be permitted to demonstrate acceptable excuse for [a] failure to meet the strict requirement of tender in admissible form'" (Matter of New York City Asbestos Litig., 190 AD3d 589, 590-591 [1st Dept. 2021], quoting Zuckerman, 49 NY2d at 562). Further, plaintiff herself testified that she spoke to Zepeda the day before the accident and warned him that there were recurring leaks on the fifth floor, which creates an issue of fact as to actual notice.

Lastly, the plaintiff has raised an issue of fact as to whether a recurring condition existed. "Actual notice of a recurring condition gives rise to constructive notice of each specific reoccurrence of the same condition. This inference may have a stronger logical basis in actions that are predicated on physical conditions (for example, a water cooler leaking water) than those based on transient conditions caused by human conduct (persons habitually leaving litter on a stairway)." (LexisNexis AnswerGuide New York Negligence § 3.07 [2024]; see Gonzalez v. Board of Educ. of City of N.Y., 165 A.D.3d 1065, 1065–1066, 87 N.Y.S.3d 63 [2d Dept. 2018] [testimony by defendant's custodial staff establishing that they were aware of recurring condition of water regularly accumulating during inclement weather in vestibule, giving rise to constructive notice].) Here, in addition to the hearsay testimony of a history of complaints, the plaintiff's expert has identified physical evidence of a history of recurring leaks.

The Court finds that plaintiff's expert's opinion is not conclusory but is properly based on observed conditions as documented in the expert's report. The dispute as to whether the photographs do or do not depict evidence of water damage is for the trier of fact to resolve.

The Court finds the remaining arguments are either without merit, or do not change the

Court's determination.

Based upon the foregoing, it is hereby

ORDERED that the defendant's motion is denied.

Dated: OCT 08 2024

ENTER:

Hon. Elizabeth A. Taylor, J.S.C.