

Torres v Cora Realty Co., L.L.C.

2024 NY Slip Op 34834(U)

July 29, 2024

Supreme Court, Bronx County

Docket Number: Index No. 24607/2019E

Judge: Kim Adair Wilson

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This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

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CRYSTAL TORRES,
Plaintiff,

Index No. 24607/2019E

-against-

Hon. KIM ADAIR WILSON
Justice Supreme Court

CORA REALTY CO., L.L.C. and CHESTNUT
HOLDINGS OF NEW YORK, INC.,
Defendants.

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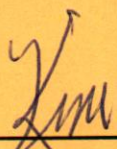
The following papers NYSCEF Doc No. (1, 7, 58 – 95), read on this SUMMARY JUDGMENT MOTION, (Seq. No. 3). Noticed on 1/30/2023 and duly submitted as NYSCEF Doc. No. 58.

	NYSCEF Doc. No.
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
Other: Stipulation	

Upon the foregoing papers,

This motion is decided in accordance with the annexed Decision and Order.

Dated: July 29, 2024

Hon. 
KIM ADAIR WILSON, J.S.C.

- 1. CHECK ONE.....
- 2. MOTION IS.....
- 3. CHECK IF APPROPRIATE.....

- CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

Motion is Respectfully Referred to Justice:
Dated:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX, NEW YORK: Part IA-12

-----X
 CRYSTAL TORRES,

Plaintiff,

-against-

CORA REALTY CO., L.L.C. and CHESTNUT
 HOLDINGS OF NEW YORK, INC.,

Defendants.

-----X

Kim Adair Wilson, J.:

“NOTICE OF MOTION” (NYSCEF Doc 58) dated and filed January 30, 2023, respectively, by Dawn M. Miller, Esq. (Gallo Vitucci Klar LLP), counsel for defendants, Cora Realty Co., L.L.C. (“Cora Realty”) and Chestnut Holdings Of New York, Inc. (“Chestnut”), seeking an Order “pursuant to Civil Practice Law and Rules (“CPLR”) Rule 3212, granting summary judgment to Defendants and dismissing the Complaint against Defendants in its entirety, and granting costs, fees, [and] disbursements,” is decided as set forth below.

The instant matter was commenced on April 18, 2019, by the filing of plaintiff’s Verified Complaint seeking monetary damages for personal injuries allegedly sustained on June 30, 2017, when plaintiff was caused to fall due to allegedly defective or hazardous conditions present on a split stairway landing on the premises located at 2170 University Avenue, Bronx, New York, alleged owned by defendants Cora and Chestnut. Plaintiff’s Complaint alleges one cause of action sounding in negligence. Defendants filed a joint Verified Answer (NYSCEF Doc 7) on August 22, 2019, asserting a general denial and twelve affirmative defenses. Plaintiff filed her Note of Issue (NYSCEF Doc 13) demanding a trial by jury on August 29, 2020.

Defendant now moves for summary judgment dismissing plaintiff’s Complaint, pursuant to CPLR 3212, and seeking costs, fees and disbursements. Submitted in support of the instant motion are the annexed “AFFIRMATION IN SUPPORT” (NYSCEF Doc 59) and “DEFENDANTS’ MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT” (NYSCEF Doc 61); the “AFFIRMATION IN REPLY” (NYSCEF Doc 89); the deposition transcripts of plaintiff and Cesar Morales (NYSCEF Docs 65 and 66, respectively); the Affidavits of Yoandi Interian, Professional Engineer (NYCSEF Doc 68), Cesar Morales (NYSCEF Doc 69), and Danni Hernandez (NYSCEF Doc 70); plaintiff’s excerpted medical records (NYSCEF Doc 71); a subpoena ad testificandum for Theresa Huggins (NYSCEF Doc 72); and various unmarked photographs (NYSCEF Doc 73 & 74).

In opposition, plaintiff submits “PLAINTIFF CRYSTAL TORRES’S [sic] MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND DISMISSAL OF THE COMPLAINT” (NYSCEF Doc 84), dated and filed May 8, 2023, respectively, by Michael H. Zhu, Esq. (Harris Keenan & Goldfarb, PLLC); unmarked photographs of the subject staircase (NYSCEF Doc 85); and the Affidavit of Joseph Farahnik, Professional Engineer (NYSCEF Doc 86).

Movants assert, in sum, that as a matter of law that neither the staircase nor with the lighting were defective, in that the building was compliant with all building codes applicable at the time of its construction; that any alleged defect was not the proximate cause of Plaintiff’s accident; and that defendants had no actual or constructive notice of any defective condition. Movant further contends that plaintiff’s deposition testimony establishes that plaintiff could clearly see the steps, which were not wet and/or broken, and therefore the proximate cause of the plaintiff’s injuries was her own physical/visual impairments and her inattentiveness. Separately, movants also posit that defendant Chestnut is merely the managing agent of the property, and lacks exclusive control over the subject premises, and thus cannot be held liable as a matter of law.

In opposition plaintiff asserts, *inter alia*, that the stairway was rendered defective or inherently dangerous due to optical confusion, in that the two landings all blended together and appeared as a single flat surface, because they were both painted gray without any distinctive markings and illuminated by inadequate lighting. Plaintiff further contends that a landowner can fail to satisfy its duty of care even in the absence of proof that a defendant violated a specific legislative or statutory enactment, and that the indistinct step combined with the dim lighting to create a foreseeable tripping hazard for pedestrians unfamiliar with the stairway, especially those who have visual impairments.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 (2003); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

To be entitled to summary judgment in a premises liability action, a defendant is required to show, prima facie, that it maintained its premises in a reasonably safe condition and that it did not create or have notice of a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises. *Fiero v. City of New York*, 190 A.D.3d 822 (2d Dept. 2021); *Stanley v. New York City Hous. Auth.*, 183 A.D.3d 564, 565, (2d Dept.

2020). The New York State Appellate Division, First Department has held that “[a] condition that is visible to one ‘reasonably using his or her senses’ is not inherently dangerous. However, a step may be dangerous where the conditions create ‘optical confusion’—the illusion of a flat surface, visually obscuring the step.” *Langer v. 116 Lexington Ave., Inc.*, 92 A.D.3d 597, 599, (1st Dept. 2012); also see *Broodie v. Gibco Enterprises, Ltd.*, 67 A.D.3d 418, (2009) where summary judgment was granted against plaintiff because the steps were painted in black and white for visibility in low light, with yellow warning signs stating “CAUTION WATCH YOUR STEP” posted within the area. Nonetheless, it is well-established that individual liability cannot be based upon an allegation that amounts to mere nonfeasance unless plaintiff establishes, as a matter of law, that the managing agent was in complete and exclusive control of the premises. *Hakim v. 65 Eighth Ave., LLC*, 42 A.D.3d 374 (1st Dept. 2007).

Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that the movants have met their initial burden to demonstrate entitlement to summary judgment against the plaintiff. With respect to that branch of the motion seeking dismissal of plaintiff’s Complaint as against defendant Chestnut, the Affidavit of building superintendent Danni Hernandez (NYSCEF Doc 70), who is employed by defendant Cora Realty, establish that defendant Chestnut did not have complete and exclusive control over the premises, and therefore cannot be held liable for nonfeasance as a matter of law (see *Hakim, supra* at 374). Plaintiff failed to rebut this contention by raising a triable issue of fact as to the non-exclusivity of Chestnut’s control over the premises. Therefore, that branch of the movants’ motion seeking summary judgment dismissing plaintiff’s Complaint against defendant Chestnut is **GRANTED**.

As to that branch of the movant’s motion seeking dismissal of plaintiff’s Complaint as against Cora Realty, movants proffered the Affidavits of Yoandi Interian, professional engineer; Chestnut’s Senior Field Manager, Cesar Morales; and building superintendent Danni Hernandez (NYSCEF Docs 68, 69, & 70, respectively); which demonstrated that the staircase was compliant with all applicable regulations, and that the defendants had received no actual notice of any defective conditions. However, on rebuttal, plaintiff successfully raised genuine material triable issues of fact including, as indicated in the Affidavit of Joseph Farahnik, Professional Engineer, whether “inadequate visual and tactile clues for the subject singular step” may have foreseeably created optical confusion, proximately causing plaintiff’s alleged injuries (see NYSCEF Doc 86 at p.8). Consequently, that branch of defendant’s motion for summary judgment dismissing plaintiff’s Complaint against defendant Cora Realty, is **DENIED**.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

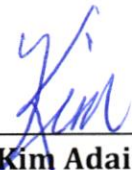
Accordingly, defendants Cora Realty Co., L.L.C. and Chestnut Holdings Of New York, Inc.'s motion seeking an Order pursuant to CPLR 3212, granting summary judgment to defendants and dismissing the Complaint against defendants in its entirety, and granting costs, fees, and disbursements is **GRANTED solely to the extent**, as stated herein. Any assessment of costs, fees and disbursements shall take place at trial or at the disposition of the matter against the remaining defendant, Cora Realty Co., L.L.C.. Further, it is hereby,

ORDERED that the clerk of court is directed to dismiss plaintiff's Complaint as against defendant Chestnut Holdings Of New York, Inc., only; and it is further

ORDERED that the movants are directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Order of this Court.

**Dated: July 29, 2024
Bronx, New York**



Hon. Kim Adair Wilson, J.S.C.