Marin v 129th St. Cluster Assoc., L.P.

2024 NY Slip Op 34970(U)

June 4, 2024

Supreme Court, Bronx County

Docket Number: Index No. 25060/2020E

Judge: Paul L. Alpert

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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: PART 26

----------X

Wendy Marin

Index №. 25060/2020E

-against-

Hon. Paul L. Alpert

Justice Supreme Court

129th Street Cluster Associates, L.P., Covington Realty Services, Inc., Pascal Realty Management Corp., and Neighborhood Partnership Housing Development Fund Company, Inc.,

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The following papers numbered 1 to _____ were read on this motion (Seq. No. 5) for _____ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

The defendants motion is decided in accordance with the annexed decision and order of the court.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 6/4/24

Hon. _____ **J.S.C.**

HON. PAUL ALPERT

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

C

SUPREME COURT OF THE STATE OF NEW YORK
----------X Index No.: 25060/2020E
Wendy Marin

Plaintiff,

DECISION/ORDER

-against-

129th Street Cluster Associates, L.P., Covington Realty Services, Inc., Pascal Realty Management Corp., and Neighborhood Partnership Housing Development Fund Company, Inc.,
Defendants.
----------X Recitation, as required by CPLR 2219 of the papers considered in the review of this motion as indicated below:

Papers	**Numbered**
Notice of Motion & Affirmation in Support	**1**
Affirmation in Opposition	**2**
Affirmation in Reply	**3**

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

The plaintiff alleged that she became injured as she delivered mail in the defendant's building on September 29, 2018. She was employed by the United States Postal Service ("USPS"). The defendants 129th Street Cluster Associates, L.P., and Covington Realty Service, Inc, (collectively, "the Building Defendants") move for summary judgment to dismiss the complaint, claiming they have no duty to inspect or repair a latent defect in a mailbox they had no legal or physical means to inspect. The motion is opposed by the plaintiff.

Ms. Marin was delivering mail to the defendant's apartment building. The apartment building was owned by 129th Street Cluster Associates, L.P. The building's lobby contained four units of mail receptacles that were mounted onto the walls of the lobby. There are two units on the right side of the lobby and two units on the left side of the lobby. While Ms. Marin was

delivering mail, one of the mail receptacles fell out of the wall and caused her injuries.

A defendant moving for summary judgment has the initial burden of making a prima facie demonstration that it neither created the dangerous condition, nor had actual or constructive notice of its existence (see *Manning v. Americold Logistics, LLC.*, 33 AD3d 427 [1st Dept. 2006]; *Kalish v. HEI Hospitality, LLC.*, 114 AD3d 444 [1st Dept. 2014]). Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (see *Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept. 2006]).

The defendants argue that there were no complaints or issues regarding the mailbox unit and even if there were complaints, they could not open the mailbox for inspection or repair without the intervention of the USPS. In support of their motion, they present the deposition testimony of Glen Allen, a mail carrier who also does repairs. He testified that complaints from mail carriers must come through him and he would then provide instructions for necessary repairs to the customer (Plaintiff's Exhibit 5 pg. 7 lines 11-22). The defendants also rely on Oliver Ford's testimony. Mr. Ford, has been employed by the defendant as a building superintendent since 1999 to the present. He testified that he never performed any inspection on any of the mailbox units (see Def. Aff. Exhibit "A" pg. 84 lines 2-5). He never performed any type of maintenance or repair on any of the mailbox units that fell on the plaintiff (see Exhibit pg. 85 lines 20-24). His understanding as superintendent is that the mailbox units are the property of the Untied States Postal Service and he only engages if a tenant's mailbox is open and he can change it upon the tenant's request (see Def. Exhibit "A" pg. 78 lines 2-8). He stated that he was not personally involved with the installation of the mailbox units (see Def.

Exhibit "A" pg. 75 lines 14-17).

The plaintiff opposes the motion and contends that the defendant's motion is untimely and defective. She also argues that the defendants failed to establish a prima facie case of entitlement to summary judgment because they failed to establish they exercised reasonable care in the ownership, operation, inspection, maintenance and repair of the mailbox unit. She claims the defendants failed to establish a lack of actual or constructive notice. The plaintiff also argues that the defendants had the sole legal duty to maintain and repair the mailbox unit. She also contends that the alleged defective mailbox unit was not a latent defect and was visible and apparent.

The plaintiff argues that the motion is untimely because the Note of Issue was filed on September 7, 2023 and the motion was not filed until December 28, 2023. The motion was made returnable on January 15, 2024, a court holiday, and the court rejected the return date. The defendant never corrected their Notice of Motion.

The defendant's motion was filed within 120 days after the filing of the note of issue pursuant to CPLR § 3212 and is therefore timely. The motion was adjourned by the court from January 15, 2024 to January 16, 2024. The parties then agreed to adjourn the defendant's motion from January 16, 2024 to February 12, 2024 in a stipulation dated January 4, 2024. The plaintiff's application to deny the defendant's motion for summary judgment as untimely is denied.

The plaintiff's argument that the motion for summary judgment should be dismissed because the motion lacked a copy of the pleadings is unpersuasive. Courts have routinely held that if a moving party lacks a copy of the pleadings pertaining to the claims against it and another

party has provided copies of those pleadings then the record is complete for purposes of deciding the motions (see *Reyes v. Sanchez-Pena*, 117 AD3d 621 [1ST Dept. 2014]; *Keech v. 30 E. 85th St. Co., LLC.*, 154 AD3d 504 [1st Dept. 2017]).

The plaintiff also claims that the motion is defective because it was not accompanied with an affidavit of a fact witness and/or expert witness in admissible form as required by CPLR § 3212(b). The defendant's motion is adequately supported by an attorney's affirmation and the deposition testimony of the superintendent, Mr. Ford (see, *Alvarez v. Propect Hosp.*, 689 NY2d 320 [Ct App 1986]). A deposition transcript is an adequate substitution for an affidavit of merit (see, *Zabari v. City of New York*, 242 AD2d 15 [1st Dept. 1998]).

The plaintiff contends that the defendant's motion is also defective because the deposition transcript was not signed by the witness and sworn to in front of a notary public. The plaintiff raised this same argument in opposition to the defendant's motion sequence number 2 to compel outstanding discovery. This court already held in a decision dated November 14, 2023 that a deposition transcript not signed by the witness but certified by the court reporter, may be considered since the witness did not challenge the accuracy of the transcript. Here, Mr. Ford's deposition transcript is certified by the court reporter, Lori Ann Carannante and he has not challenged the accuracy of the transcript.

The plaintiff claims that the defendant's motion is defective because the deposition transcript of the plaintiff was not submitted with the motion. The plaintiff incorrectly relies on CPLR § 3116 (a) for the proposition that the defendants must annex a copy of the plaintiff's deposition transcript to their motion. This statute does not indicate that the defendants must annex a copy of the plaintiff's deposition transcript to their motion.

The plaintiff also argues that the defendants failed to establish a lack of actual or constructive notice of the alleged defective mailbox unit. There was no testimony that the defendants performed any type of inspection of the mailbox unit. Mr. Ford was asked when was the last time prior to September 29, 2018 that him or anyone else acting on behalf of the defendant or property management performed any type of inspection of the mailbox unit in the vestibule area in order to determine the condition of the mailbox unit. Mr. Ford's response was "I don't recall any time" (see Def. Motion, Exhibit "A" pg. 130 lines 7-17). The Appellate Division in *Williamson, v. Ogden Cap Properties, LLC.*, 124 AD3d 537 (1st Dept. 2015), upheld the trial court's decision and held that the "defendants failed to make a prima facie showing that they lacked constructive notice of the alleged defective mailbox panel, because it is undisputed that they never inspected the panel prior to the plaintiff postal worker's accident" (Id. at 537). "Defendant's alleged lack of a key to open the panel is not determinative, as they failed to show that a cursory inspection would not have disclosed the loose condition of the panel observed by plaintiff and the notice witness in the months prior to the accident" (*Id.* at 537). In *Gomez v. Samaritan Daytop Vil., Inc.*, 216 AD3d 456 (1st Dept. 2023), the Appellate Division reversed the trial court's decision granting summary judgment in favor of defendant, when the defendant failed to produce any evidence of its maintenance activities on the day of the accident and that the dangerous condition did not exist when the area was last inspected or cleaned before the plaintiff fell.

The plaintiff contends that the defendants had actual notice of the defective condition of the mailbox unit. The plaintiff testified that she first observed the defective condition of the mailbox unit in May of 2018. She stated that the problem with the mailbox unit was that it stuck

out 2 inches from the wall and it was loose (see Exhibit "H" pg. 85 lines 2-21 and pg. 92 lines 4-11). She complained to Mr. Ford, in May of 2018 when she first started delivering mail at the building (see Exhibit "H" pg. 86 lines 12-15). The last time she complained to Mr. Ford was the day before the accident (see Exhibit "H" pg.89 lines 3-15). She stated that the mailbox looks broken, and that it had a black screw on the top (see Exhibit "H" pg. 89 lines 23-25 and pg. 90 lines 2-3). She testified that there were screws missing on the inside of the mailbox unit (see exhibit "H" pg. 94 lines 13-15). Before the accident, she saw two screws on the lefthand side of the mailbox unit that were missing (see Exhibit "H" pg. 97 lines 18-20). She is familiar with the mailbox units and stated that there is supposed to be four screws fastening the mailbox unit (see Exhibit "H" pg. 98 lines 22-25 and pg. 99 lines 2-4). In June of 2018 she looked inside the mailbox unit and saw screws missing on both the right and left sides of the unit as well as the top and bottom (see Exhibit "H" pg. 99 lines 18-25). She also complained to "Mr. Glen" in June and September of 2018 that the mailbox unit was still not fixed (see Exhibit "H" pg. 103 lines 8-17).

The plaintiff submits an affidavit from its liability expert, Alvin Ubell. He avered that on September 28, 2022 he went to the defendant's building to inspect the mailbox unit with the plaintiff, her attorney and defendant's counsel present. He claims that the plaintiff verified to him that the condition of the mailbox during his inspection was the same condition the mailbox unit was in at the time of her accident on September 29, 2018. Upon a visual inspection of the mailbox unit in question he saw the unit protruding out from the wall. He observed a black philips screw driver that was drilled into the perimeter frame of the mailbox. He opined that placement of this screw was done improperly to secure the mailbox unit to the surrounding wall

structure. He was able to push and pull the mailbox unit with gentle force because it lacked the appropriate mounting screws to fasten the mounting frame to the adjacent wall. This was observed without having access to the interior of the mailbox unit. He opined that the failure to utilize additional mounting screws in a rear facing direction violated the manufacturer's installation instructions explains why the mailbox unit was loose and fell out of the wall opening.

Mr. Ubell also opines that a cursory glance at the mailbox unit indicates that the mailbox unit was protruding out from the wall in a visible, apparent and obvious manner. The other mailbox units in the lobby are flush with the surrounding wall structures. He states in his affidavit that the mailbox unit that injured the plaintiff was noticeably sticking out by approximately one to two inches on the left side, and the lower left corner of the unit. The defective condition of the mailbox unit was visible, apparent and long standing to any reasonably careful and prudent observer and building owner or property management company. He also opines that the defective condition of the mailbox unit was not a latent condition because the condition of the mailbox unit was discoverable with even the most cursory inspection. Moreover he states that the mailbox unit is in the lobby of the building where the building superintendent would pass by on a recurrent, daily basis. He claims the superintendent did not require access to the interior of the mailbox to inspect the exterior of the mailbox unit.

The plaintiff also argues that the defendant had the sole responsibility to maintain and repair the mailbox unit in question. The U.S P.S. "Postal Operations Manual" sets forth the policies, regulations and procedures. Subsection 632.11 is entitled "Mail Receptacles - Customer Obligation- Responsibilities" and it indicaes "Appropriate mail receptacles must be provided for the receipt of mail... Purchase, installation and maintenance of mail receptacles are responsibility

of the customer" (Plaintiff's Exhibit "3"). She argues that the superintendent is maintaining the mail receptacles with the mistaken belief that they are the property of the U.S.P.S. while in fact the Postal Operations Manual specifies that the installation and maintenance is the customer's responsibility. Mr. Ford testified that his understanding is that he has nothing to do with the mailbox units and he does not repair them because they are the property of the United States Post Office (see Def Motion Exhibit "A" pg. 78 lines 2-8).

The defendants failed to make a prima facie showing that it lacked constructive notice of the alleged defective mailbox unit because it never inspected the mailbox unit prior to the plaintiff's accident (see *Williamson* at 537; see also *Williams v. Beth Israel Hospital Association*, 201 AD3d 429 [1st Dept. 2022]). The defendants' argument that they could not open the mailbox for inspection or repair is also unpersuasive. The plaintiff raised an issue of fact that a cursory inspection of the mailbox unit would have revealed that the mailbox unit was protruding out from the wall and that it was missing screws.

The defendants also did not prove they lacked actual notice of the alleged defective condition. The plaintiff testified that in May of 2018 she complained to Mr. Ford, regarding the mailbox unit sticking out, and the missing screws on the inside of the unit. She also testified that in June of 2018, she complained to "Mr. Glen", a mail carrier who is also allegedly in charge to make sure the cylinder of the mailboxes are working. She complained to him that the mailboxes were still not fixed (see Exhibit "H" pg. 103 lines 2-12).

The plaintiff also raises a triable issue of fact regarding which party is responsible to maintain the mailbox unit. The Postal Operations Manual indicates that it is the customer (the building owner's) responsibility to purchase, install and maintain the mailbox units. However,

Mr. Allen testified that complaints from mail carriers go to him and he provides instructions to the customers regarding necessary repairs.

The defendants motion is denied as they have not established their prima facie burden that they lacked constructive or actual notice of the alleged defect of the mailbox unit. There is also an issue of fact raised through the plaintiff's expert's affidavit and the plaintiff's testimony that the condition of the mailbox was not a latent defect and instead was visible and apparent for many months.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the defendants' motion is denied, and it is further,

ORDERED AND ADJUDGED, that the defendants 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: June 4, 2024

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