Fontanez v New York City Hous. Auth.
2025 NY Slip Op 35048(U)
December 30, 2025
Supreme Court, New York County
Docket Number: Index No. 162594/2019
Judge: Denis Reo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 65

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DAMARIS FONTANEZ	INDEX NO.	162594/2019
Plaintiff,	MOTION DATE	06/18/2025
- v -	MOTION SEQ. NO.	003
NEW YORK CITY HOUSING AUTHORITY,		
Defendant.	**DECISION + ORDER ON MOTION**	

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HON. DENIS REO:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 8P4, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96

were read on this motion to/for SUMMARY JUDGMENT.

Damaris Fontanez (plaintiff) brings this negligence action against defendant New York City Housing Authority (NYCHA) alleging that she was startled by rats as she was leaving defendant's premises, causing her to become injured. NYCHA moves pursuant to CPLR 3212 to dismiss the complaint. NYCHA's motion is GRANTED for the reasons that follow.

BACKGROUND FACTS

Plaintiff's testimony

Plaintiff testified that on the morning of June 16, 2019, after her nightshift had ended, she was leaving a NYCHA-owned building located at 1774 Third Avenue, New York, New York (the building), when she observed four or five rats enter the corridor located on the ground floor of the building through the door leading to the outside of the building (NY St Cts Elec Filing [NYSCEF] Doc No. 70 at 19, ¶¶ 9-21; at 20, ¶¶ 20-25; at 21, ¶¶ 1-4; at 24, ¶¶ 20-22; at 28, ¶¶ 14-25; at 29, ¶¶ 1-11). When she saw the rats, she moved out of the way (*id.* at 41, ¶¶ 10-19), but

in doing so, she tensed up and experienced pain (*id.* at 32, ¶¶ 10-15). Plaintiff testified that her right leg buckled (*id.*), and she fell to the ground (*id.* at 32, ¶ 25; at 33, ¶¶ 2-3), but that no other part of her body touched the ground (*id.* at 33, ¶¶ 7-9). Plaintiff also testified that when her leg buckled, and she was falling to the ground, the rats kept coming toward her but did not touch her but, ultimately, scurried past her and out through a door behind her (*id.* at 35, ¶¶ 10-21). Plaintiff testified that there was nothing slippery or sticky on the floor and that the floor was not cracked or broken (*id.* at 35, ¶¶ 4-9). Plaintiff testified that after the incident, she went to her car and drove home (*id.* at 46, ¶¶ 22-25).

According to plaintiff, at the time of the incident, she worked for the fugitive enforcement division warrant squad in the New York City Police Department (NYPD) office located on the second floor of the building (*id.* at 21, ¶¶ 20-25; at 22, ¶¶ 7-12; at 27, ¶¶ 5-10). Plaintiff alleged that she had previously seen rats in front of the building more than once but never in the building (*id.* at 48, ¶¶ 11-18). According to plaintiff, the day of the incident was the first time she saw rats inside (*id.* at 49, ¶¶ 3-14). Plaintiff testified that she had told coworkers in general conversation about the rats when she saw rats on prior occasions but that she did not report the presence of rats to NYCHA or the NYPD (*id.* at 49, ¶¶ 15-25; at 50, ¶¶ 1-12; at 52, 9-18). Plaintiff also testified that she did not know of anyone else who complained to NYCHA regarding rats (*id.* at 62, ¶¶ 15-18). Plaintiff additionally testified that during her time working in the building, an exterminator came to the building, but she did not know how often (*id.* at 53, ¶¶ 7-13). Plaintiff described seeing glue traps around the office before the incident for the entirety of the three years she worked there (*id.* at 53, ¶¶ 21-25; *id.* at 54, ¶¶ 1-6).

Plaintiff's injuries from the October 16, 2018 incident included a partial tear of her right hamstring (*id.* at 71, ¶¶ 7-9; at 94, ¶¶ 15-21). Plaintiff alleged that because of the incident

involving the rats, she sustained a complete tear of her right hamstring, resulting in hamstring repair surgery (*id.* at 71, ¶¶ 2-6; at 66, ¶¶ 13-15; at 72, ¶¶ 23-25).

Albert Martinez's testimony

NYCHA's exterminator, Albert Martinez (Martinez), testified that, at the time of the incident, he was assigned to two areas, including the subject building (NYSCEF Doc No. 71 at 15, ¶¶ 3-25; at 16, 1-11; at 17, ¶¶ 19-25). Martinez could not recall the last time he visited the building (*id.* at 18, ¶¶ 15-21; at 68, ¶¶ 21-25). He testified that he had not been there for years and that he switched to different developments from time to time (*id.* at 18, ¶¶ 15-21; at 68, ¶¶ 21-25). Martinez testified that at the time of the incident, unless responding to a specific ticket from a resident or a supervisor, he went to the building monthly to perform preventative pest control services (*id.* at 23, ¶¶ 12-25; at 24, ¶¶ 2-4; at 26, ¶¶ 5-16, 21-25). Martinez testified that he treated for roaches, water bugs, and rats (*id.* at 28, ¶¶ 8-25), and that the treatment included bait stations (*id.* at 28, ¶¶ 21-25), glue traps (*id.* at 29, ¶¶ 21-24), Ditrac tracking powder (*id.* at 33, ¶¶ 2-8), granular pellets for outside burrows (*id.* at 31, ¶¶ 5-19), and the closing of burrows (*id.* at 48, ¶¶ 13-25, at 49, ¶¶ 6-8). According to Martinez, on occasion, NYCHA engaged outside contractors to conduct extermination work, depending on the budget, the severity of the rat infestation, and the NYCHA exterminator's workload (*id.* at 62, ¶¶ 4-6; at 63, ¶¶ 2-15).

Martinez testified that he had treated for rats in the building, but only in the basement and the outside area of the building (*id.* at 27, ¶¶ 17-22; (NYSCEF Doc No. 71 at 27, 17-25; at 28, ¶¶ 2-6; at 31, ¶¶ 20-25; at 32, ¶¶ 2-25). Martinez also testified that there were no signs of rats in the residences and that the rats usually stayed in the basement (*id.* at 27, ¶¶ 23-25; at 28, ¶¶ 2-6; at 34, ¶¶ 3-16). According to his testimony, a compactor was located in the building's basement (*id.* at 36, ¶¶ 15-16) and apart from the food inside the compactor, he did not see food elsewhere (*id.*

at 36, ¶¶ 20-25; at 37, 2-6; at 37, ¶¶18-25; at 38, ¶¶ 2-5). Martinez described the general condition of the basement as fairly clean (*id.* at 37, ¶¶ 11-17).

Harrison Torres affirmation

Harrison Torres, a superintendent at Lexington Houses, submitted an affirmation in support of defendant's motion (NYSCEF Doc No. 72). According to Torres's affirmation, the building is part of Lexington Houses, which is comprised of four buildings (*id.* at 1, ¶ 2). Torres affirmed that the subject building is part of building # 4, but that the subject building is not a dwelling and is not used for residential purposes (*id.* at 2, ¶ 5). Torres also affirmed that based on his search of NYCHA's work order system, in the year prior to the date of the incident, there were five resident complaints regarding rats on the grounds of building # 4, and NYCHA exterminators responded to each ticket "in a timely fashion" (*id.* at 2, ¶ 7).

Rodriguez and Brown affidavits

In opposition, plaintiff submitted the affidavits of NYPD Detective Erik Rodriguez (Det. Rodriguez) and NYPD Sergeant Damion Brown (Sgt. Brown) (NYSCEF Doc Nos. 80 & 81). In his affidavit, Det. Rodriguez attested that he worked at the building for approximately five years prior to the date of the incident and that he had previously seen rats inside and outside the building on many occasions prior to June 16, 2019 (NYSCEF Doc No. 80, ¶¶ 1, 4, & 5). The affidavit does not include dates or descriptions of the specific areas where Det. Rodriguez observed rats. Similarly, in his affidavit, Sgt. Brown attested that he has worked at the building since approximately 2015 and had previously seen rats inside and outside the building on many occasions. Sgt. Brown's affidavit is also silent as to the dates and areas where he observed rats at the building.

DISCUSSION

A. Summary judgment standard

Summary judgment is a drastic remedy that should be granted only where the moving party establishes entitlement to judgment as a matter of law and eliminates all triable issues of fact (see *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make a prima facie showing of entitlement to summary judgment as a matter of law requires denial regardless of the sufficiency of the opposing papers (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The evidence must be viewed in a light most favorable to the nonmoving party, who is entitled to every favorable inference (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). However, "[s]ummary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019] [internal quotation marks and citations omitted]).

B. Actual and constructive notice

In a negligence action, "[a] defendant who moves for summary judgment . . . 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" (*Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010] [internal quotation marks and citation omitted]). A property owner has a duty to maintain its premises in a reasonably safe condition (*see Basso v. Miller*, 40 NY2d 233, 249 [1976]) and may be held liable where it had actual or constructive notice of a dangerous condition and failed to timely remedy it (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Where the defendant did not create the dangerous condition or lacked actual notice, "[a] defendant may be charged with

constructive notice when a dangerous condition is ongoing ... [and] routinely left unaddressed (*Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 471 [1st Dept 2012] [internal quotation marks and citation omitted]). The courts have consistently held that, "[t]o 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 Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]; *Louis v City of New York*, 223 AD3d 526, 526 [1st Dept 2024]; *Arnold v New York City Hous. Auth.*, 296 AD2d 355, 355 [1st Dept 2002]). Summary judgment is proper where a defendant demonstrates that it has a routine in place to address dangerous conditions (*see Morrison v New York City Hous. Auth.*, 209 AD3d 588 [1st Dept 2022], *affd* 41 NY3d 1023 [2024] [summary judgment for defendant affirmed where "defendant demonstrated that on the day of plaintiff's accident, it had a proper and reasonable inspection and cleaning routine in place to address such conditions" (citations omitted)]).

Here, NYCHA demonstrated that it did not create the alleged rodent condition, and did not have actual or constructive notice of a rat infestation on the ground floor. NYCHA, through Martinez's testimony, established that it had a proper and reasonable pest control procedure, using a variety of pest control methods, including treatment for rats using bait stations, glue traps, Ditrac tracking powder, and granular pellets for outside burrows, as well as closing of rat burrows. Additionally, Martinez testified that NYCHA, on occasion, engaged outside contractors to perform extermination work. Moreover, plaintiff testified that for the three years she worked in the building prior to the incident, she observed glue traps in the office, which is consistent with Martinez's testimony that he conducted extermination work in the building

General awareness of a dangerous condition is insufficient to establish actual or constructive notice. (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994] [citations

omitted]; *Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 838 [1986]; *Chaney v Abyssinian Baptist Church*, 246 AD2d 372 [1st Dept 1998]; *Durney v New York City Tr. Auth.*, 249 AD2d 213, 214 [1st Dept 1998]). Here, plaintiff testified that she never saw rats inside the building, which is consistent with Martinez's testimony that the only place he observed rats in the building was the basement. Based on plaintiff's own testimony that she had never seen rats inside the building and never complained about rats to NYCHA, NYCHA could not have been aware of the condition of rats that allegedly caused plaintiff's injuries in the building's corridor. For the foregoing reasons, NYCHA met its initial burden of making a prima facie showing that it did not create the alleged hazardous condition and that it lacked actual or constructive notice regarding the presence of rats in the corridor.

Shifting the burden to plaintiff, the evidence offered by plaintiff is insufficient to raise a triable issue of fact so as to defeat NYCHA's prima facie showing (*see McHugh v Metro N. Commuter R.R.*, 33 Misc 3d 1211[A] [Sup Ct, NY County 2011]). To the extent that Sgt. Brown and Det. Rodriguez attested that they observed rats inside the building and that complaints were made to NYCHA, the affidavits lack specificity concerning the alleged rat sightings and include no information regarding the individuals who made the complaints or the basis of Sgt. Brown's and Det. Rodriguez's knowledge that the complaints were made. Thus, the affidavits are not sufficient to raise a triable issue of fact as to notice. Plaintiff's own affidavit wherein she attests that she observed rats in the building is inconsistent with her prior testimony and is insufficient to defeat defendant's prima facie showing of entitlement as a matter of law (*Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007] ["Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, creates only a feigned

issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (internal quotation marks and citations omitted)]; *Nicholas v New York City Hous. Auth.*, 65 AD3d 925, 927 [1st Dept 2009]).

Nor has plaintiff raised an issue of fact as to the length of time the alleged rodent condition existed because, as plaintiff testified, the rats entered the building, ran past her, and exited through another door. The rats did not remain in the location of the incident, and plaintiff has not submitted any evidence to demonstrate that they were at that location before. The fact that the rats ran inside the building and away from the location of the incident supports NYCHA's claim that it did not have notice of the dangerous condition that allegedly caused plaintiff's injury (*Braddy v New York City Hous. Auth.*, 241 AD3d 1117, 1118 [1st Dept 2025]; *see Smith v Andre*, 43 AD3d 770, 772 [1st Dept 2007]; *McHugh v Metro N. Commuter R.R.*, 33 Misc 3d 1211(A) [Sup Ct 2011]). The rats were transient and insufficient to establish notice.

Moreover, plaintiff did not testify that she observed garbage left out in the building, which could attract rodents. Similarly, Martinez testified that the only place he observed food was inside the bag inside of the compactor (NYSCEF Doc No. 71, at 37, ¶¶ 18-25; at 28, 2-5). Thus, plaintiff has not presented any evidence to suggest that the alleged rodent condition existed long enough for NYCHA to discover it and remedy it or that NYCHA was aware of any refuse or garbage that could attract rodents and had enough time to clean it up but did not. Based on the foregoing, NYCHA established that it did not create or had actual or constructive notice of the presence of rats inside the building, and plaintiff failed to raise an issue of fact sufficient to defeat NYCHA's motion for summary judgment.

C. Foreseeability

In addition to not having notice of the rat condition, NYCHA has also demonstrated that the risk of harm to plaintiff was not reasonably foreseeable. In response, plaintiff has not adequately demonstrated that it is foreseeable that a person would be injured when they are startled by a rat.

In addressing foreseeability to a landowner, the New York State Court of Appeals has held as follows:

> "It is beyond dispute that landowners and business proprietors have a duty to maintain their properties in reasonably safe condition (*see, e.g., Kush v. City of Buffalo,* 59 N.Y.2d 26, 462 N.Y.S.2d 831, 449 N.E.2d 725; *Basso v. Miller,* 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868). It is also clear that this duty may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances (*see, Pulka v. Edelman,* 40 N.Y.2d 781, 783, 390 N.Y.S.2d 393, 358 N.E.2d 1019). The duty of a landowner or other tort defendant, however, is not limitless. It is an elementary tenet of New York law that '[t]he risk reasonably to be perceived defines the duty to be obeyed' (*Palsgraf v. Long Is. R.R. Co.,* 248 N.Y. 339, 344, 162 N.E. 99).
>
> The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court (*see, Palka v Servicemaster Mgt. Servs. Corp., supra,* at 585, 611 N.Y.S.2d 817, 634 N.E.2d 189). In analyzing questions regarding the scope of an individual actor's duty, the courts look to whether the relationship of the parties is such as to give rise to a duty of care (*see, e.g., Waters v. New York City Hous. Auth.,* 69 N.Y.2d 225, 513 N.Y.S.2d 356, 505 N.E.2d 922; *Pulka v. Edelman, supra,* at 783, 390 N.Y.S.2d 393, 358 N.E.2d 1019), whether the plaintiff was within the zone of foreseeable harm (*see, e.g., Palsgraf v. Long Is. R.R. Co., supra*) and whether the accident was within the reasonably foreseeable risks (*see, e.g., Danielenko v. Kinney Rent A Car,* 57 N.Y.2d 198, 455 N.Y.S.2d 555, 441 N.E.2d 1073). The nature of the inquiry depends, of course, on the particular facts and circumstances in which the duty question arises. The analysis is also driven by considerations of public policy. As we stated in *Waters v. New York City Hous. Auth., supra,* at 229, 513 N.Y.S.2d 356, 505 N.E.2d 922, '[t]he common law of torts is, at its foundation, a means of apportioning risks and allocating the burden of loss.'" *Di Ponzio v Riordan,* 89 NY2d 578, 582–83 [1997].

Being startled "outside of the orbit or zone of foreseeable harm" is insufficient to establish liability (*Lynfatt v Escobar*, 71 AD3d 743, 744-745 [2d Dept 2010] [affirming

summary judgment for defendant, where plaintiff was "outside of the orbit or zone of foreseeable harm" when she was startled by the loud noise caused by a motor vehicle accident that occurred 40 feet away, jumped from her seat, and injured her back and neck]).

For a plaintiff to establish foreseeability, "[i]t is well established that the risk of injury as a result of defendant's conduct 'must not be merely possible, it must be natural or probable'" *McHugh*, 33 Misc 3d 1211[A] at *5, citing *Pinero v Rite Aid of New York, Inc.*, 294 AD2d 251, 252 [1st Dept 2002], *affd* 99 NY2d 541 [2002] ["Foreseeability of risk is an essential element of a negligence cause of action because a person can only be 'negligent' when the event giving rise to the injury could have been reasonably anticipated—and thus avoided with the exercise of appropriate care" (citation omitted); *see Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555, 562 [1993]]. In *McHugh*, a Metro-North Railroad (Metro-North) commuter was startled by a rat at the Grand Central Terminal and fell after he jumped out of the way of the running rodent (*McHugh*, 33 Misc 3d 1211[A] at *1). The plaintiff in McHugh sued Metro-North and the Metropolitan Transportation Authority (MTA) for injuries he sustained as the result of his accident. Defendants moved for summary judgment, and the court found that defendants established entitlement as a matter of law (*id.* at *6). In so holding, the court found as to foreseeability that

> "the risk of danger of plaintiff's fall after being frightened by a rat, scurrying across or along the ramp, is as minimal and unforeseeable as a matter of law. Plaintiff was not injured by tripping over the rat, but, rather, by a sequence of events that could not have reasonably been foreseen or protected against. As such, the record provides no reasonable basis for a trier of fact to infer, without resorting to speculation, that defendants' negligence in allegedly storing garbage at the end of the station and attracting rodents, caused plaintiff's accident" (*id.* at *5).

Similarly here, it was not foreseeable that plaintiff would become so startled at the sight of scurrying rats that she would tense up, causing her leg to buckle. Plaintiff did not trip over the

scurrying rats; nor did the rats attack her. In fact, the rats did not come into contact with her at any point and ran past her through another door. There is no basis to conclude that NYCHA's purported negligence in its extermination practices, storage of refuse, and leaving doors open to the outside area of the complex caused plaintiff's incident and resulting injury. As such, summary judgment for NYCHA is GRANTED.

D. General Municipal Law § 205-e claim

The Court of Appeals has held that "[t]o make out a claim under section 205–e, a plaintiff must "[1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm" (*Williams v City of New York*, 2 NY3d 352, 363 [2004] [citation omitted]). As discussed above, this court has already determined that NYCHA's alleged negligence did not cause plaintiff's injury. Additionally, this court determined that NYCHA did not have actual or constructive notice of the alleged presence of rats in the building's corridor (*see Fazzolari v City of New York*, 105 AD3d 409, 410 [1st Dept 2013]). Further, plaintiff testified that at the time of the incident, her shift had already ended, and she was exiting the building (*see generally Matter of Cantello v Regan*, 154 AD2d 867, 867 [3d Dept 1989]). Thus, she was not injured while in the discharge or performance of her duties as a police detective in accordance with the statute (*see* General Municipal Law § 205-e [1]). For the foregoing reasons and the reasons discussed above, NYCHA established its entitlement to summary judgment as a matter of law, and plaintiff failed to raise a triable issue of fact in opposition; thus, NYCHA's motion is GRANTED.

CONCLUSION

Accordingly, it is

ORDERED that defendant New York City Housing Authority's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the County Clerk is directed to enter judgment accordingly.

12/30/2025
DATE

DENIS REO, A.J.S.C.

CHECK ONE:	x	CASE DISPOSED				NON-FINAL DISPOSITION		
	x	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE