

INDEX NO. 152734/2016
FILED: NEW YORK COUNTY CLERK 10/19/2018 09:46 AM

NYSCEF DOC. NO. 42

RECEIVED NYSCEF: 10/19/2018

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 152734/2016

RYAN HICKS,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

WRENBROOK REALTY, L.P., WEBB AND BROOKER, INC.

Defendant.

DECISION AND ORDER

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Upon the documents presented to the Court and upon oral argument, it is decided that the motion for summary judgment is denied.

In the case at bar, plaintiff claims that she was injured as a result of a trip and fall accident on the interior stairs between the second and third floor of the building located at 204 West 149th Street in Manhattan on August 20, 2015, where she is a tenant. She alleges that defendants were negligent in maintaining the interior staircase handrail. Specifically, plaintiff asserts that as she descended the steps, she was caused to fall when the wooden railing she had been holding onto came off the metal railing to which it was attached. She testified that the wooden railing came off "in one piece" and came into contact with her legs which caused her to fall backwards, hit her back on the steps and then slide 5-6 steps down to the 2nd floor.

Defendants assert that they are entitled to summary judgment as they had no actual or constructive notice of any alleged condition for such a period of time, in the exercise of reasonable care, it should have been corrected. Defendants argue that there is no evidence that they created any defective condition or was on notice of any condition relating to the bannister. Defendants assert that plaintiff testified that she used the staircase and bannister on a regular

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basis without incident and that no complaints were ever made to them regarding the bannister.

Thus, defendants argue that no triable issue of fact exists which would preclude summary judgment.

Plaintiff opposes the motion arguing that the evidence presented warrants summary judgment in that she made a complaint about the subject handrail to Jackie Guzman property manager of the building prior to her accident around January or February 2015. Plaintiff testified that she told Ms. Guzman that the handrail was loose and was shifting. Although plaintiff used the staircase on a daily basis, she stated that she would only use the handrail sparingly prior to the accident.

In support of her opposition, plaintiff presents the testimony of Dimitry Naylor, Vice President of defendant Webb and Booker. He testified that he had a staff working for him regarding the subject building. Ms. Guzman was an assistant manager-compliance supervisor. Ms. Guzman was responsible for helping run and manage the subject building. There was also a maintenance staff and superintendent, Jose Gintero. The assistant superintendent was Blas Diaz, in addition to two porters. According to Mr. Naylor, the porter and superintendent were responsible for cleaning the main staircase and Mr. Diaz was responsible for handling repairs, including broken handrails.

Mr. Naylor testified that if a tenant had a complaint, the tenant would be instructed to notify Ms. Guzman. If a tenant had a complaint about a handrail, the tenant would call Ms. Guzman, who would then notify the superintendent. If the superintendent notified her of a problem and she would tell them to fix it or ask if he needed her to call someone else to fix it. It is possible that someone would complain to the superintendent and he would not let Ms. Guzman know about it.

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Ms. Guzman was responsible for conducting inspections of the building in the common areas such as the staircase, which she did such every few weeks. Mr. Naylor went over to the premises "every month or so to see "what was going on". No records were kept documenting inspections made. After the accident, Mr. Naylor was informed that something was wrong with the bannister and one of the superintendents fixed it. He testified that Mr. Diaz would have been the one to fix the bannister. Mr. Naylor does not know if a new bannister was purchased or if the old one was placed back on. He did not recall the last time he had been to the building prior to the accident or the last time the bannister was last checked or inspected.

Ms. Guzman is no longer employed by the company. Mr. Dias is also no longer employed, because "he was never at work and for non-performance. Mr. Naylor is not aware of any incident reports or accident reports regarding the incident at bar.

Plaintiff has also submitted the affidavit of Ms. Sherece Claxton, another resident of 204 West 149th Street. Plaintiff informed Ms. Claxton of the accident on the day it occurred. Ms. Claxton stated in her affidavit that she is familiar with the handrail in question, as she has walked up and down the same stairs several times a day for years. She stated that the handrail between the second and third floors had been loose and would shift when she would hold onto it for approximately two to three months prior to the plaintiff's incident. She also stated that it was not until after plaintiff's incident that management did anything about the subject handrail.

Plaintiff further submitted the affidavit of Stanley Fein, Licensed Professional Engineer who after reviewing photographs of the scene, opined that the building was not maintained in a safe condition and that the handrails was not maintained in good working condition. He also concluded that the loose handrail was extremely dangerous and was the proximate cause of the accident and the injuries sustained by plaintiff.

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The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320[1986]); *Zuckerman v. City of New York*, 49 NY2d 557[1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not by merely pointing to gaps in plaintiff's proof (*Mondello v. DiStefano*, 16 AD3d 637 [2d Dept 2000]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman*, at 562).

In the case at bar, while movant has met the initial burden of prima facie entitlement to summary judgment, plaintiff has submitted evidence in admissible form showing the existence of triable issues of fact which preclude the award of summary judgment.

Plaintiff has presented evidence that she complained of the defective handrail to the building's management before the incident occurred. In addition, the deposition testimony of defendants' employees establish that no records of complaints or incidents were kept by them and that they kept no records of inspections of the bannisters in the building. Further, the person responsible for recording and maintaining complaints is no longer employed by defendant. Moreover, the person responsible for repairing broken bannisters was discharged for non-performance of his duties.

Considering the evidence in the light most favorable to the plaintiff, multiple factual questions remain, regarding the issues of actual and constructive notice and whether the

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condition allegedly causing this incident existed prior to the accident, support the denial of defendants' motion for summary judgment.

This is the Decision and Order of the Court.

10/19/2018
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE