1-9-12

NEW YORK SUPREME COURT - COUNTY OF BRONX
**IAS PART 08**

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SONYA ROBINSON,

Plaintiff,

INDEX No. 23125/2006

-against-

RADIO WAVE CO., LLC, and RADIO WAVE, LLC,

Defendant,

Present:
HON. BETTY OWEN STINSON
J.S.C.

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The following papers numbered 1 to 3 read on this motion for summary judgment
Noticed on 12-07-2010 and submitted as No. 85 on the Calendar of 01-21-2011

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion -Exhibits and Affidavits Annexed | 1 |
| Order to Show Cause | |
| Answering Affidavits and Exhibits | 2 |
| Reply Affidavits and Exhibits | 3 |
| Stipulations | |
| Memoranda of Law | |

Upon the foregoing papers this motion by defendant for summary judgment is decided per annexed memorandum decision.

Dated: January 5, 2012
Bronx, New York

**BETTY OWEN STINSON, J.S.C.**

JAN 09 2012

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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SONYA ROBINSON,

Plaintiff,

-against-

RADIO WAVE CO., LLC, and RADIO WAVE, LLC,

Defendant.

----------X

INDEX № 23125/2006
DECISION/ORDER

HON. BETTY OWEN STINSON:

This motion by defendant Radio Wave Co., LLC, also s/h/a Radio Wave, LLC, for summary judgment dismissing the complaint is granted.

On June 16, 2006, plaintiff was injured while descending stairs in a building managed by defendant when her left foot slipped on the last step of a staircase and her right foot landed hard on the floor below as she tried to regain her balance. Plaintiff then filed this lawsuit against the defendant. At the close of discovery, defendant made the instant motion for summary judgment to dismiss plaintiff's complaint for her failure to produce evidence showing any negligence by the defendant that caused her fall.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

To establish a *prima facie* case of negligence in a slip and fall case, a plaintiff must prove the defendant had actual or constructive notice of the dangerous or defective condition and

sufficient time, within the exercise of reasonable care, to correct or warn about its existence (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Lewis v Metropolitan Transportation Authority*, 99 AD2d 246 [1st Dept 1984] *aff'd* 64 NY2d 670 [1980]). Actual notice is established if it can be proven that the defendant created the defective condition (*Lewis*, 99 AD2d 246). Constructive notice can be established if the defect is visible and apparent and in that condition for a sufficient length of time that the defendant is presumed to have seen it or was negligent in failing to see it (*Gordon*, 67 NY2d 836). Landowners are not necessarily liable for all possible dangerous situations occurring on their property. The mere happening of an accident does not establish liability (*Lewis*, 99 AD2d 246).

In support of the motion, defendant offered a copy of the pleadings, the bill of particulars, the deposition testimony of plaintiff and of a building employee, an affidavit by defendant's expert engineer, and a report by plaintiff's expert engineer including photographs of the subject stairs. The bill of particulars alleged defendant's negligence to be unspecified violations of the New York City Administrative Code and the New York State Building Code, improper width and height of the steps on the subject staircase, improper type of paint used, and "chips and defects" on the nose of the stair from which plaintiff fell. The photographs show painted stairs with no apparent defects except for some minimal dents in the nose of the last step.

Plaintiff testified that she was 5' 4" tall and weighed about 160 pounds at the time of her accident (deposition of Sonya Robinson, February 1, 2009 at 91, 94). She was wearing backless, toeless shoes with 2" heels called "mules" (*id.* at 20). She was carrying a computer in a case on her left shoulder and a small purse and "junior-sized" duffel bag in her left hand (*id.* at 35-36). There was no handrail at the place she fell, but she did not recall ever using handrails on any of

the stairs (*id.* at 36-38). There were elevators in the building, but she usually used the stairs when the elevators were not immediately available (*id.* at 24-25). She did not recall any chips on the stairs (*id.* at 31). The stairs had a painted surface and were not wet at the time of her fall (*id.* at 31, 96). She had not heard of anyone else falling on the stairs before, and she had never fallen there herself (*id.* at 32, 43). When asked the reason for her fall, she responded that she "slipped on the stair" (*id.* at 96).

John Hubi testified that he was a maintenance worker in the subject building at the relevant time (deposition testimony of John Hubi, February 29, 2008). The stairs were last painted before plaintiff's fall on July 4, 2005 (*id.* at 12). Hubi used an oil-based porch and deck enamel to paint the steps and the same paint has been used continuously since that time (*id.*). There were no worn or uneven steps (*id.* at 25). They were checked every day (*id.* at 22). There were no prior accidents on those steps (*id.* at 29).

Plaintiff's expert, Robert Schwartzberg, P.E., examined the stairs four months after the accident and took photographs. He stated the stairs were not in compliance with specifically enumerated sections of the New York City Administrative Code and the New York State Fire Prevention and Building Code, particularly as to riser heights and widths and railings for staircases and the State Code as a reference for "good and accepted practice". He found the steps were painted and stated that they did not have a non-slip surface without providing further details. He stated further that, "when wet", the treads and landings would become "slick and slippery". Mr. Schwartzberg concluded that hazardous conditions were created by the code violations as to the varied widths and heights of steps and the lack of railing and these caused the plaintiff's injury.

Defendant's expert, Vincent A. Ettari, P.E., stated that the building was constructed in 1922, was in compliance with New York City's Building Code in effect at the time as for the dimensions of stairs and other safety requirements, a search of records showed the stairs had never been reconstructed or altered, they continued to be in compliance with later codes, and would have been "grandfathered" into compliance with later building codes in any event since there had been no structural changes to the stairs after the original construction. The variance in heights and widths of stairs was within the allowed range and the subject stairs were not exit stairs subject to the requirements cited by Mr. Schwartzberg. The New York State Building Code specifically exempts New York City and is, therefore, inapplicable. Mr. Ettari inspected the stairs four years after the accident and found the coefficient of friction on the painted steps to be more than adequate to prevent slipping. Referring to plaintiff's expert's report. Mr. Ettari stated that "good and accepted practice" for the construction of stairs, allegedly violated in the case of the subject stairs, was not clarified by citation to any authoritative source in existence at the time of the subject stairs' construction and, therefore, impossible to apply.

In opposition to the motion, plaintiff offered the affidavit of Mr. Schwartzberg reiterating his claim that there were code violations and adding that the stairs were "slick and slippery". He stated the code violations were cited to show that "conditions" on the subject staircase were not in accordance with good and accepted practice. According to Mr. Schwartzberg, those "slick and slippery" conditions on the stairs four months after the accident when he examined them were different than the conditions four years later when Mr. Ettari examined them, although Mr. Schwartzberg did not add any information explaining how he knew that.

Defendant has demonstrated its entitlement to summary judgment which the plaintiff has

not refuted with admissible evidence. Plaintiff's deposition testimony makes clear she does not know the reason for her fall. She stated simply that she slipped on the last stair. Neither varying heights or widths of risers or the absence of a handrail are implicated in this statement. Furthermore, plaintiff's failure to specify the alleged code violations in her bill of particulars or identify the reason for her fall in her testimony cannot be cured by her expert's conclusion that code violations caused her fall (*see Daniarov v NYCTA*, 62 AD3d 480 [1st Dept 2009][plaintiff's failure to specifically identify cause of slip and fall in her testimony may not be cured by her expert's subsequent conclusion that code violations caused accident]; *Raghu v NYCHA*, 72 AD3d 480 [1st Dept 2010][no objective evidence connecting fall with purported defects on stairs where plaintiff did not attribute fall to uneven stairs, inadequate handrail or powder on stairs, but testified only that she slipped]). Mr. Schwartzberg reported initially that the painted surface of the stairs would become slick and slippery "when wet", but plaintiff testified that the stairs were not wet at the time of her fall. Although Mr. Schwartzberg later concluded that the "slick and slippery"conditions on the stairs would differ four years later when defendant's expert, Mr. Ettari, examined them, he offered no basis for that conclusion, and Mr. Hubi testified that the same type of paint continued to be applied to the stairs in question after plaintiff's fall.

Movant is directed to serve a copy of this decision on the Clerk of Court who shall enter judgment dismissing the action.

This constitutes the decision and order of the court.

Dated: January 5, 2012
Bronx, New York

**BETTY OWEN STINSON, J. S.C.**