

Baez v Webster Tremont Equities Corp.
2017 NY Slip Op 32184(U)
September 13, 2017
Supreme Court, Bronx County
Docket Number: 303538/14
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 303538/14**

Virmary Baez,
Plaintiff,

-against-

DECISION and ORDER

Webster Tremont Equities Corp.,

Defendant.

Present:

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

In the instant action, plaintiff alleges that she sustained injuries as a result of being bitten by beg bugs in an apartment unit where she resided, which was owned by defendant.

Defendant now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint, on the grounds that: (1) there is no competent evidence or contemporaneous examination which support plaintiff's claim that her marks and injuries occurred on defendant's property and were caused by bed bugs, as opposed to any other cause or condition, and (2) defendant had no notice, actual or constructive, of the alleged condition.

In support of summary judgment, defendant submitted, *inter alia*, the deposition testimony of plaintiff and Ivette Rivera, and plaintiff's medical records. At her deposition, plaintiff testified as follows: She began living at the subject premises, a family shelter, in August of 2013. The first incident occurred in September of 2013. Prior to this incident, she made no complaints to anyone regarding insects at the premises. An exterminator visited the building twice a month. An exterminator made a regular, scheduled visit to her apartment one week after the incident. The exterminator did not report any insects in her apartment. She does not know whether an exterminator went to her apartment prior to this incident. When she moved into the apartment, there was a bed and mattress sealed with a plastic cover in the apartment. The plastic cover "says it's to prevent bed bugs and insects from traveling from people's clothes

into the mattress.” She became aware that she had been bitten by something when she woke up in the middle of the night because she was itchy. The following day she noticed a spot on her elbow which became swollen and continued itching. She began a job as a dog trainer a few days later. She told someone at work that she thought she had a mosquito bite that was getting worse. She went to the hospital by ambulance three to four days after the incident and told doctors that she “was bitten by something” but that she “just didn’t know exactly what it was.” The doctors at the hospital told her that “it could have been a house spider.” She did not see a spider in her apartment. The second incident occurred around February of 2014 when she was bitten in her left buttocks by something.

Plaintiff’s medical records indicate that she arrived at the Jacobi Medical Center Emergency Room by ambulance on September 13, 2014 at about 7:00 p.m. with “[P]ain redness swelling and heat to [her left] forearm x 3 days after bitten by an insect.” The medical records note that she had an “elevated cyst” to the left forearm with a “dark center.” She was diagnosed with “[M]ultiple and unspecified wound of upper limb.” She was discharged on September 14, 2013 at about 11:43 a.m. On February 22, 2014, at about 7:45 a.m., plaintiff was taken by ambulance to St. Barnabas Hospital Emergency Room. The medical records note that plaintiff stated that she had been bitten by a spider two days prior. She was diagnosed with an abscess on her left buttock and was discharged at about 1:33 p.m. the same day.

At her deposition, Ivette Rivera testified as follows: She has worked for defendant for eight years. She is the Program Director and oversees the operation of the shelter, manages its staff and responds to client complaints. Defendant has a contract with Broadway Exterminating which exterminates all of the units at the premises twice a month. Broadway Exterminating staff is escorted by the building’s super or porter. In addition, unit inspections are done weekly by her staff and a work order is created for any issues that arise regarding pest control. If there is a complaint made regarding insect infestation, a thorough inspection of the unit by the staff is conducted in which they look for holes in the wall and ceiling tiles as well as any cracks in the tile floor. Staff will also look for any nests and seal all cracks or holes out of precaution. The unit is also cleaned and wiped down “exhaustively” and new linen is put in. If insects are found,

the exterminator is called. For as long as she has worked for the defendant, neither she nor any of her staff had ever received a complaint about bedbugs at the premises other than plaintiff's complaint after returning from the hospital. The shelter has "never had any infestation . . . with bedbugs." The staff received training from the Department of Homeless Services "as to what to look for, the effects and habits of bed bugs." On one occasion, plaintiff returned to the building from a hospital, walked into the lobby and "threw" a paper from the hospital at the front desk which stated that she had "cellulitis," and complained of bed bugs for the first time. In response, a record was generated, the unit "was checked for bedbugs, mattresses, everything, the dressers, every seam, every area" and there were "no bedbugs present." The super performed the inspection and reported back to her that the "room was filthy" and needed to be cleaned out by the staff.

In opposition to summary judgment, plaintiff submitted the affirmation of counsel, an EPA website printout entitled "How to Find Bed Bugs," and a copy of an email entitled "Virmary Baez to newspix 7/21/2014." In his affirmation, counsel points out plaintiff's deposition testimony that the initial insect bite occurred two days prior to her beginning employment as a dog trainer; once she was moved to a different apartment unit at the premises she no longer experienced any issues with insect bites; that plaintiff complained to a shelter staff member about an insect bite after she returned from Jacobi Hospital; that she had a video which depicted bed bugs between the mattress cover and her bed sheets which she is no longer in possession of as it was recorded on a phone she no longer had; and that she requested to change apartment units but her requests were denied until her daughter was bitten by what the doctors told her was a bed bug. Counsel also contends that the super failed to correctly inspect for bed bugs because he checked in the daytime and without a flashlight while the EPA document recommends inspecting with a flashlight at night when bed bugs are active. Counsel also points to the email to NewsPix "detailing her ordeal with the hazardous condition of the insect infestation" with the premises.

In her email to newspix, plaintiff states that the premises "is infested with rats, spider[s] and bedbugs" and that she addressed the issue with staff who did "NOTHING! No transfer to a

different unit or to a different shelter.” She also states that her one-year-old daughter was rushed to the hospital on July 18, 2014 “where the doctor determined that it was an insect bite which needed to be treated with antibiotics and a cream to prevent it from getting worse.” Plaintiff also states that there were “other parents in the lobby ranting about their kids being bitten over night” and that she has “4 different videos of spiders and whatever weird bugs have been crawling and biting us!” which she has shown to the staff who “have done nothing to help us!”

* * * * *

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *See Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

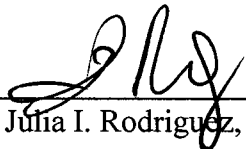
To establish a *prima facie* case of negligence, plaintiff must prove that defendant owed a duty to her, that defendant breached that duty, and that the breach proximately caused her injury. *See Solomon v. City of New York*, 66 N.Y.2d 1026, 1027, 499 N.Y.S.2d 392 (1985). To establish a case of negligence that is based on circumstantial evidence, a plaintiff must demonstrate the existence of facts and conditions from which the negligence of the defendant and the causation of the injury by that negligence may be reasonably inferred. *See Schneider v. Kings Highway Hosp. Ctr.*, 67 N.Y.2d 743, 744, 500 N.Y.S.2d 95 (1986). While plaintiff’s proof need not positively exclude every other possible cause of the injury, it must render those causes sufficiently “remote” or “technical” to enable a jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence.” *See id.*

Here, defendant demonstrated that no bedbugs were observed at the subject premises and that, other than plaintiff's complaint, there were no complaints of bedbugs or infestations of bedbugs at the premises. Notably, the premises were professionally exterminated twice a month with no reports of bedbugs. Also, after plaintiff complained of bedbugs, her apartment unit was thoroughly inspected by the super of the building who detected no bedbugs.

Significantly, at her deposition, plaintiff did not testify that she ever saw a bedbug or a spider at the premises. Indeed, the only evidence submitted by plaintiff indicating that she had ever actually seen a bedbug (or a spider) in her apartment is the email to newspix dated July 21, 2014, approximately three weeks after the verified complaint was filed in this action. Curiously, though she claimed in that email to have videos of "spiders" and "weird bugs," her attorney states that she no longer possesses those videos. Plaintiff also claims in that email that her daughter was severely bitten by a bedbug(s) and "rushed" to the hospital on July 18, 2014, however, she submitted no evidence, i.e. medical records, doctor's affidavit, to support that claim. Nor is there any mention of bedbugs in any of plaintiff's medical records. The only mention of an "insect" or "spider" concerns what plaintiff told medical personnel she suspected to have caused her condition. Significantly, the only diagnoses she received from medical professionals include an "unspecified wound of her upper limb" in September of 2013 and an "abscess" on her left buttocks in February 2014. Assuming, *arguendo*, that she was "bitten" by an insect on those two occasions, that, in itself, is insufficient to raise an issue of fact as to defendant's negligence in maintaining the premises. Any other conclusion would be speculative at best.

Based upon the foregoing, defendant's motion for summary judgment is **granted**, and the complaint is hereby dismissed.

Dated: Bronx, New York
September 13, 2017



Hon. Julia I. Rodriguez, J.S.C.