

**Wright v 17th St. Prop. Co. L.L.C.**

2024 NY Slip Op 32254(U)

July 5, 2024

Supreme Court, New York County

Docket Number: Index No. 155793/2019

Judge: Paul A. Goetz

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

**PRESENT:** HON. PAUL A. GOETZ **PART** **47**

*Justice*

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ANGELA WRIGHT,

Plaintiff,

- v -

17TH ST. PROPERTY CO. L.L.C., HOTEL 17 INC., THE  
ANDREWS ORGANIZATION, INC.

Defendant.

-----X

**INDEX NO.** 155793/2019

**MOTION DATE** 11/21/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action involving a fall on the exterior stairway of a hotel, defendant Hotel 17 Inc. (Hotel 17) moves pursuant to CPLR § 3212 for summary judgment dismissing plaintiff’s complaint, and defendant 17<sup>th</sup> St. Property Co. LLC (17<sup>th</sup> Street) cross-moves for same relief.

**BACKGROUND**

At the time of her accident on May 20, 2018, plaintiff resided at the building located at 225 East 17<sup>th</sup> Street, New York, New York 10003, which was owned by 17<sup>th</sup> Street and leased by Hotel 17 (NYSCEF Doc No 47) when at approximately 2:30 a.m. she left her room to smoke a cigarette outside, where it was dark and wet from rain a few hours earlier (NYSCEF Doc No 51, 56:5-57:17, 59:2-10, 62:2-3). Plaintiff walked out the front doors of the building and down the several steps to reach the ground level, where she smoked a cigarette, and then turned to go back inside (*id.*, 60:12-61:23). On her way back up the carpeted steps, which were not equipped with a

handrail, she slipped and fell face-forward (*id.*, 61:22-62:17). Her face made direct contact with the steps, causing injuries (*id.*, 62:18-64:16).

Plaintiff alleges that her accident was caused by 17<sup>th</sup> Street and Hotel 17's negligence and failure to install a handrail (NYSCEF Doc No 1). Plaintiff filed her note of issue on September 28, 2023 (NYSCEF Doc No 32), such that the deadline for either party to file a motion for summary judgment was November 27, 2023 (NYSCEF Doc No 31 [status conference order indicating that dispositive motions must be filed within 60 days of the filing of the note of issue]).

On November 21, 2023, defendant Hotel 17 filed a motion for summary judgment dismissing plaintiff's complaint on the basis that Hotel 17 is not the owner of the building; there was no defective condition on the stairway; and Hotel 17 did not cause, create, or have notice of any allegedly defective condition (NYSCEF Doc No 39). Plaintiff opposes, arguing that as the tenant, Hotel 17 has a common law and contractual duty to maintain the premises in a safe condition and that issues of fact remain as to whether the stairs presented a hazardous condition (NYSCEF Doc No 57). On February 16, 2024, 17<sup>th</sup> Street filed a cross-motion for summary judgment dismissing plaintiff's complaint on essentially the same grounds as asserted by Hotel 17 (NYSCEF Doc No 61). Plaintiff opposes the cross-motion on the grounds that it is untimely and not a true cross-motion, and that in any event, 17<sup>th</sup> Street failed to meet its prima facie burden (NYSCEF Doc No 79).

## DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’” (*Pullman v Silverman*, 28 NY3d 1060,

1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action.” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility.” (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

At the outset, defendant 17<sup>th</sup> Street’s cross-motion for summary judgment is untimely. 17<sup>th</sup> Street argues that its motion should nevertheless be considered because it seeks relief “nearly identical” to that sought by Hotel 17’s timely motion for summary judgment (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1<sup>st</sup> Dept 2006] [“A cross motion for summary judgment made after the expiration of the statutory [] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief ‘nearly identical’ to that sought by the cross motion”]). “It is true that . . . an

untimely *but correctly labeled* cross motion may be considered at least as to the issues that are the same in both it and the motion, without needing to show good cause” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87 [1<sup>st</sup> Dept 2013] [emphasis in original]). However, “[a] cross motion is ‘[] a motion by any party *against the party who made the original motion*, made returnable at the same time as the original motion’ [and] is an improper vehicle for seeking relief from a nonmoving party” (*id.*, citing Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C2215:1 [emphasis added]). Since 17<sup>th</sup> Street’s purported cross-motion is made against plaintiff, rather than the moving party, it is not a true cross-motion. Accordingly, it will not be considered and will be denied as untimely.

Hotel 17 first argues that it is entitled to summary judgment dismissing plaintiff’s complaint because the NYC Building Code does not apply to it, as it is not the owner of the building and “[s]tatutory provisions are applicable to the owners of real property, not to lessees” (NYSCEF Doc No 39). Hotel 17 cites no legal authority for this proposition, and indeed, it is the incorrect measure of its liability. In its lease agreement, Hotel 17 agreed to “assum[e] the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the demised premises whether interior or exterior” (NYSCEF Doc No 47, § 2). Moreover, Hotel 17’s general manager, Tariq Khan, stated Hotel 17’s “maintenance workers do an inspection of the common areas of the building, including the exterior stairway, every morning” (NYSCEF Doc No 49) and that Hotel 17 would be responsible for resolving any problems that arise with the stairs (NYSCEF Doc No 48, 26:21-27:8). “[C]ontrol over property is the touchstone of liability, [and] the Hotel’s substantial control over the [stairs] presents issues of fact as to its duty to maintain [same], and precludes summary dismissal of the complaint against it” (*Matias v New Yorker Hotel Mgt. Co., Inc.*, 201 AD3d 592, 594 [1<sup>st</sup> Dept 2022]).

Hotel 17 also asserts that there was no defective condition on the stairway where plaintiff fell, as demonstrated by the affidavit of its expert witness, Stan Pitera, PE. Pitera reported that his dynamic slip resistance testing demonstrated that “[t]he exterior steps were slip-resistant in a wet state in compliance with modern building code requirements and industry standard custom and practice” (NYSCEF Doc No 52, ¶ 17). However, plaintiff’s expert witness, William Marletta, PhD, CSP, opined that “the tread nosings and carpet aren’t level and true, making them dangerous for pedestrian use and in violation of good and accepted safe practice, which requires walking surfaces be level with no sloping, curvature, significant wear, or depression” (NYSCEF Doc No 58, ¶ 63). These conflicting expert opinions raise an issue of fact which cannot be resolved by the court as a matter of law (*Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004] [“Conflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment”]).<sup>1</sup>

Hotel 17 argues that even if the stairway was somehow defective, Hotel 17 cannot be held liable because it did not cause, create, or have notice of the alleged defective condition. It notes that Khan never received any complaints of the exterior stairway being slippery or dangerous in any way, nor could he recall any other instance of someone tripping on the stairway (NYSCEF Doc No 49, ¶¶ 12-16). This evidence is sufficient for Hotel 17 to make its prima facie showing that it lacked actual notice (*Djuric v City of New York*, 172 AD3d 456, 457 [1st Dept 2019] [“Defendants made a prima facie showing of lack of [actual] notice . . . through the testimony of the construction manager’s representative who . . . saw no evidence of the alleged

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<sup>1</sup> Moreover, while Pitera states that “[t]he subject stairway, by code, was not a required stair [but] an access stair [and as such] was not required to have any handrails” (NYSCEF Doc No 52, ¶ 30), he provides no basis for this categorization. As Marletta points out, NYC Building Code defines an access stair as “[a] stair between two floors,” whereas an exterior stair is “[a] stair open to the outdoor air” (NYC Admin Code § 27-232). The stairs on which plaintiff fell led from the building’s front doors to the sidewalk, and therefore it was an exterior stair requiring handrails (*Chester v Museum of Modern Art*, 180 AD3d 562 [1st Dept 2020] [exterior stairs require handrails]).

condition, and the evidence that there were no complaints or prior similar incidents at the property”]) and plaintiff has not raised an issue of fact regarding actual notice. However, Hotel 17 has not established a lack of constructive notice, which exists when “a defect [is] visible and apparent . . . for a sufficient length of time prior to the accident to permit the defendant’s employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Importantly, Hotel 17 “offered no evidence as to when the sidewalk had last been inspected,” though a few hours had passed between the rainstorm and plaintiff’s fall, “and the evidence of their general procedures” of inspecting the stairway each morning, “standing alone, was insufficient to satisfy their burden on summary judgment” (*Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412, 413 [1<sup>st</sup> Dept 2013]).

In sum, Hotel 17 failed to establish that it cannot be held liable as a lessee of the premises; that there was no defective condition present which led to plaintiff’s fall; or that it lacked constructive notice of the condition alleged by plaintiff. Accordingly, its motion for summary judgment dismissing the complaint as against it will be denied.

### CONCLUSION

Based on the foregoing, it is

ORDERED that defendant Hotel 17’s motion for summary judgment dismissing the complaint as against it is denied; and it is further

ORDERED that defendant 17<sup>th</sup> Street’s purported cross-motion for summary judgment dismissing the complaint as against it is denied.

7/5/2024

DATE

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PAUL A. GOETZ, J.S.C.

CHECK ONE:

  
  
  


CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

  
  
  


NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: