

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Sussman v MK LCP Rye LLC

Sussman v. MK LCP Rye LLC, 2018 NY Slip Op 06143 (N.Y. Ct. App. 2018) · No. 156066/14; appellate numbers 6976 and 6975 · Decided September 20, 2018

SUMMARY

The Appellate Division, First Department, affirmed the denial of defendants’ motion for summary judgment in a premises-liability action arising from the plaintiff’s fall in a hotel stairwell. The court held that evidence concerning a guardrail’s noncompliance with NFPA No. 101 raised an issue of fact regarding negligence and that defendants had not established the absence of constructive notice. The court dismissed as academic defendants’ appeal from the order adhering to the original determination upon reargument.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Per Curiam; Renwick, J.P.; Gische, J.; Kapnick, J.; Gesmer, J.; Kern, J.
JURISDICTION	New York
DECIDED	September 20, 2018
DOCKET	156066/14; appellate numbers 6976 and 6975
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their motion for summary judgment dismissing the complaint and from a subsequent order that, upon reargument, adhered to the original determination.
STANDARD OF REVIEW	Summary judgment is proper only when the movant establishes prima facie entitlement to judgment as a matter of law; once that showing is made, the opposing party must raise a triable issue of fact. The appellate court reviewed whether defendants made the required prima facie showing and whether plaintiff raised a triable issue.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion; precedential within the applicable New York courts subject to later treatment.
PARTIES	MK LCP Rye LLC, et al. v. Andrew Sussman

TOPICS

premises liability negligence standard of care proximate cause appellate procedure

PRACTICE AREAS

premises liability negligence construction law appellate procedure

QUESTIONS PRESENTED

1. Whether defendants established prima facie entitlement to summary judgment by showing that the hotel stairwell was in a reasonably safe condition.
2. Whether plaintiff raised a triable issue of fact by submitting expert evidence that the stairwell violated NFPA No. 101 and that the guardrail's inadequate height constituted evidence of negligence or a standard of care.
3. Whether defendants established that they lacked constructive notice of the allegedly dangerous or defective guardrail condition.
4. Whether plaintiff's inability to identify the precise cause of his slip or trip defeated his negligence claim.
5. Whether the appeal from the order adhering to the original determination upon reargument was academic.

HOLDINGS

1. Plaintiff raised a triable issue of fact by submitting an expert affidavit providing concrete proof that NFPA No. 101 applied at the relevant time and that the stairwell guardrail was materially below the advocated 42-inch height. A violation of a standard applicable by reference in the building code, even if not incorporated as a mandatory code provision, may constitute some evidence of negligence and may establish a standard of care.
2. Defendants failed to establish prima facie that they lacked constructive notice of the dangerous or defective condition or that they did not breach their common-law duty of care. Compliance with applicable building codes was not dispositive of common-law negligence, and the guardrail's inadequate height was apparent and existed long enough for defendants to discover and remedy it.
3. Plaintiff's inability to identify the precise cause of his slip or trip was not fatal to his claims because evidence supported his contention that the lack of a 42-inch guardrail was a proximate cause of his injuries. An accident may have more than one proximate cause.
4. The appeal from the order entered upon reargument was dismissed as academic because the court affirmed the original order denying summary judgment.

KEY QUOTATIONS

"A violation of NFPA No. 101, which was "applicable by reference in the [State] Building Construction Code - not incorporation - would constitute some evidence of negligence and may establish a standard of care"

(*1)

*“However, their claimed compliance with applicable building codes is not dispositive of whether they breached their common-law duty of care” (*1)*

*“In any event, there can be more than one proximate cause of an accident.” (*1-*2)*

FACTUAL BACKGROUND

Andrew Sussman fell in a hotel stairwell, lost his balance, went over the stairwell guardrail, and was injured. The existing guardrail was no more than 32 inches high, while NFPA No. 101 advocated a 42-inch-high guardrail and was listed among generally accepted standards applicable to the State Building Construction Code in effect when the hotel was constructed. Plaintiff submitted an expert engineer's affidavit asserting that the stairwell violated NFPA No. 101 and that the lack of a 42-inch guardrail proximately caused his injuries.

PROCEDURAL HISTORY

Supreme Court, New York County denied defendants' motion for summary judgment dismissing the complaint. Upon reargument, the court adhered to that determination. The Appellate Division unanimously affirmed the original order and dismissed the appeal from the reargument order as academic.

DISPOSITION

affirmed

CASES CITED

- Lugo v State of New York, 7 Misc 3d 1027[A], 2005 NY Slip Op 50792[U], *6 (Ct Cl 2005)
- Zebzda v Hudson St., LLC, 72 AD3d 679, 680-681 (2d Dept 2010)
- Hoteling v City of New York, 55 AD3d 396, 398 (1st Dept 2008), affd 12 NY3d 862 (2009)
- Schmidt v One N.Y. Plaza Co. LLC, 153 AD3d 427, 430 (1st Dept 2017)
- Kellman v 45 Tiemann Assoc., 87 NY2d 871 (1995)

OPINION

PER CURIAM.

Sussman v MK LCP Rye LLC (2018 NY Slip Op 06143) Sussman v MK LCP Rye LLC 2018 NY Slip Op 06143 Decided on September 20, 2018 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on September 20, 2018 Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ. 156066/14 6976 6975 [*1]Andrew Sussman, Plaintiff-Respondent, vMK LCP Rye LLC, et al., Defendants-Appellants.

Mauro Lilling Naparty, LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants. Meyer Suozzi English & Klein, P.C., Garden City (Kevin Schlosser of counsel), for respondent. Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 25, 2017, which denied

defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Appeal from order, same court and Justice, entered February 23, 2018, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic. In opposition to defendants' prima facie showing that the hotel stairwell from which plaintiff fell was in reasonably safe condition, plaintiff raised an issue of fact by submitting an affidavit by an expert engineer who averred that the stairwell violated National Fire Protection Association (NFPA) No. 101.

NFPA No. 101, which was listed in the "Generally Accepted Standards Applicable to the State Building Construction Code" in effect at the time of the hotel's construction, advocated the construction of a 42-inch-high guardrail along the stairwell.

The record shows that the existing guardrail was no more than 32 inches high. A violation of NFPA No. 101, which was "applicable by reference in the [State] Building Construction Code - not incorporation - would constitute some evidence of negligence and may establish a standard of care" (*Lugo v State of New York*, 7 Misc 3d 1027[A], 2005 NY Slip Op 50792[U], *6 [Ct Cl 2005] [footnote and internal citations omitted]; see *Zebzda v Hudson St., LLC*, 72 AD3d 679, 680-681 [2d Dept 2010]).

The cases on which defendants rely are distinguishable because the plaintiffs' experts in those cases did not offer the requisite "concrete proof of the existence of the relied-upon standard as of the relevant time" (*Hotaling v City of New York*, 55 AD3d 396, 398 [1st Dept 2008], *affd* 12 NY3d 862 [2009]; see also e.g. *Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 430 [1st Dept 2017]).

Defendants failed to establish prima facie that they did not have constructive notice of a dangerous or defective condition. They argue that the stairwell complied with applicable building codes and that they never received any violations regarding the stairwell.

However, their claimed compliance with applicable building codes is not dispositive of whether they breached their common-law duty of care (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871 [1995]). Moreover, the existence of a guardrail less than 42 inches high, although not in violation of a particular mandatory code, was obvious and had existed for a sufficient time for defendants to discover and remedy it.

Contrary to defendants' argument, plaintiff's inability to identify the cause of his slip or trip on the stairs, which made him lose his balance and go over the rail, is not fatal to his claims, given the evidence supporting his contention that the proximate cause of his [*2]injuries was the lack of a 42-inch guardrail.

In any event, there can be more than one proximate cause of an accident. We have considered defendants' remaining contentions and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: SEPTEMBER 20, 2018 CLERK

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