COURT OF APPEALS NO. APL-2023-00045

TO BE ARGUED BY:
SI AYDINER, ESQ.
TIME REQUESTED: 15 MINUTES

State of New York
Court of Appeals

GREGORY MORRISON,

Plaintiff-Appellant,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. NYCHA FAILED TO ELIMINATE ALL MATERIAL ISSUES OF FACT BY SUBMITTING THE BUILDING INSPECTION REPORTS NOTING UNSATISFACTORY TREADS AND IGNORING THESE FINDINGS UNTIL REPLY

As this court has previously observed, "the court's role in adjudicating a motion for summary judgment [] is issue identification, not issue resolution." *Speller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38, 44, 760 N.Y.S.2d 79, 83 (2003). A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317 (1985) (emphasis added). Consistent with *Winegrad's* holding, the Appellate Divisions have held that a movant does not meet its burden where the movant's *own submissions* raise—rather than eliminate—material factual issues. *McGuire v. McGuire*, 197 A.D.3d 897, 900, 153 N.Y.S.3d 280, 285 (4th Dep't 2021); *Bynum v. Camp Bisco, LLC*, 198 A.D.3d 1164, 1165, 155 N.Y.S.3d 617, 621 (3d Dep't 2021); *Gjokaj v. Fo*x, 25 A.D.3d 759, 760, 809 N.Y.S.2d 156, 157-58 (2d Dep't 2006); *Giandana v. Providence Rest Nursing Home*, 32 A.D.3d 126, 146 n.8, 815 N.Y.S.2d 526, 541 (1st Dep't 2006), *rev'd on other grounds*, *Giandana v. Providence Rest Nursing Home*, 8 N.Y.3d 859, 832 N.Y.S.2d 476 (2007).

The underlying evidentiary sequence is as follows: NYCHA moved for summary judgment attaching Building Inspection Reports ("BIR") produced in discovery. The BIRs contained numerous antecedent notations of unsatisfactory treads. In its principal affirmation, NYCHA categorically ignored the BIRs and waited, until reply, to acknowledge and address (however inadequately) its contents and findings. This is the backdrop for analysis that NYCHA ignores.

Owing to its explicit use of the word "eliminate,"[1] *Winegrad* requires NYCHA to affirmatively reconcile the multiple pre-accident BIR notations of unsatisfactory treads to meet its burden for summary judgment—a reconciliation that required NYCHA to eliminate negative permissible inferences Morrison was entitled to from these notations. Mechanically, this could have come from an affidavit or other documentary evidence conclusively establishing that the notations are irrelevant to Morrison's claims or that, if relevant, the condition was putatively remediated. (None of this was done here.) The importance of NYCHA reconciling the BIR notations in its principal affirmation is magnified when *Winegrad's* requirement of issue elimination is considered against another common law rule adopted by the Appellate Divisions: that "a deficiency of proof

[1] The word "eliminate" leaves no room for negotiation because its ordinary meaning is to "to put an end to or get rid of." https://www.merriam-webster.com/dictionary/eliminate. The juxtaposition of the word eliminate, against the backdrop that the non-movant is entitled to every favorable inference, demonstrates that the burden can only be met if the movant conclusively *negates* every favorable inference drawn from its proof.

in moving papers [for summary judgment] cannot be cured by submitting evidentiary material in reply." *Henry v. Peguero*, 72 A.D.3d 600, 602, 900 N.Y.S.2d 49, 51 (1st Dep't 2010); *All Am. Ins. Co. v. Wilson*, 207 A.D.3d 1124, 1125, 171 N.Y.S.3d 707, 708 (4th Dep't 2022); *Agulnick v. Agulnick*, 191 A.D.3d 12, 16, 136 N.Y.S.3d 462, 467 (2d Dep't 2020); *Westbrook v. Village of Endicott*, 67 A.D.3d 1319, 1320 n.1, 889 N.Y.S.2d 317, 318 (3d Dep't 2009). Here, NYCHA's first acknowledgment of its BIR notations is in its reply affirmation. And though its belated attempt to militate against notations of unsatisfactory treads is deficient (as detailed later), the sequencing of NYCHA's arguments violates *Winegrad* and a line of subsidiary authorities rejecting reply-briefing as the conduit for a movant to meet its burden.

A) NYCHA's Claim That Unsatisfactory Treads Pertain To General Awareness Was Not Predicated On Evidence But Rather, An Improper Affirmation By Trial Counsel And NYCHA's Claim The Building Inspection Reports Were For Different Staircases Was Not Raised Before The Nisi Prius Court

Even if NYCHA's reply affirmation could be used to properly meet its burden, it suffers from two disjunctive defects improvidently overlooked by the First Department. First, NYCHA argues that the unsatisfactory tread notations "reflect nothing more than general awareness of a condition." (NYCHA's Br. 13; Record on Appeal ("R.") 795 (reply affirmation to the nisi prius court: "a 'general awareness' of dirt on the stair treads.")). NYCHA, however, *failed* to cite any evidentiary basis (documentary or testimonial) in the record supporting its

contention. Rather, NYCHA advanced a conclusory assertion from trial counsel who lacked personal knowledge over what the inspections revealed, what prompted the unsatisfactory notations, and if the condition was remediated. *Zuckerman v. New York*, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598 (1980) (holding "the bare affirmation of [movant's] attorney who demonstrated no personal knowledge of the manner in which the accident occurred. Such an affirmation by counsel is without evidentiary value and thus unavailing.").

Conversely, in the absence of facts to the contrary as here, Morrison, as the non-movant, was entitled to the inference that the BIR notations support his underlying theory—the treads were dangerously slippery. *Negri v. Stop & Shop, Inc.*, 65 N.Y.2d 625, 626, 491 N.Y.S.2d 151, 152 (1985) (holding summary judgment requires "[v]iewing the evidence in a light most favorable to the [non-movant] and according [non-movant] the benefit of every reasonable inference."). The First Department failed to follow this court's holding in *Negri*—and shifted the burden to the non-movant while construing the facts in the light least favorable to Morrison—when it held "the building inspection reports . . . [do not] set forth the specific nature of the unsatisfactory condition." (R. 870). Given that NYCHA did not competently establish what its own BIR notations referred to, the burden never shifted to Morrison to establish the "nature of the unsatisfactory condition."

This finding by the First Department constituted an improper transfer of the initial movant's burden from NYCHA to Morrison.

Second, the First Department, again, improvidently transferred the movant's burden to Morrison, by finding "plaintiff failed to raise an issue of fact . . . as the building inspection reports neither indicate the specific staircases or floors with unsatisfactory treads." (R. 870). This is because NYCHA did *not* take the position before nisi prius court that BIR records were for irrelevant staircases or floors. (*See id.* 795-96 (NYCHA's reply affirmation "**POINT III**")). NYCHA raised this argument for the first on appeal and it should have been rejected as unpreserved. *Henry v. N.J. Tr. Corp.*, 39 N.Y.3d 361, 367, 189 N.Y.S.3d 131, 134 (2023) (holding "[i]n general, arguments, including constitutional challenges, are preserved only if presented at the trial court level."). Indeed, NYCHA's only attempt to militate against its BIR notations was, as discussed, the unsupported "general awareness of dirt" claim. (R. 795).

II. NYCHA INCORRECTLY ARGUES THAT AMADOS SANTOS'S AFFIDAVIT WAS CONSISTENT WITH HIS TESTIMONY WHEN THERE WERE MULTIPLE MATERIAL CHANGES IN THE SUBSTANCE OF HIS TESTIMONY

NYCHA argues here that Amados Santos's ("Santos") affidavit "was consistent with his sworn deposition testimony." (NYCHA Br. p. 18). The juxtaposition of Santos's deposition testimony to his affidavit reveals that this contention is meritless. There are, of course, multiple instances of divergent,

material, testimony. For example, Santos testified that he would clean the stairs on Tuesdays and Wednesdays (R. 695) whereas in his affidavit he averred to cleaning the stairs only on Wednesdays (*id.* 727 ¶ 3). At his deposition Santos claimed that he was not familiar with the "janitorial work schedule" and deferred knowledge of this issue to his supervisors (*id.* 698) before averring at length about the "janitorial schedule" in his affidavit (*id.* 727 ¶ 2). And in a transparent attempt to avoid prior deposition testimony, Santos changed his testimony concerning when he cleaned the staircases on the day of the accident. At his deposition, Santos was asked:

> Q. Do you know which staircase you would have been cleaning on that Wednesday [of this accident], which of the two?
>
> A. I have no idea.
>
> Q. Would you do one staircase on Tuesday and another one on Wednesday or did you sometimes reverse it or how did it work?
>
> A. Sometimes I would switch.

(*Id.* 705). Thereafter, in an affidavit prepared by NYCHA's trial counsel Santos averred:

> I followed this janitorial schedule when I cleaned the stairwells of the building . . . on Wednesday, May 16, 2018 from 8:00 a.m. until 8:15 a.m., and from 12:30 p.m. until 2:30 p.m.

(*Id.* 727 ¶ 4). Not only does Santos change his testimony from not knowing what he did on the day of Morrison's accident to knowing precisely what, and when, he

did it, this passage has other hallmarks of inconsistency. Indeed, Santos "followed" a janitorial schedule he testified at his deposition to not being familiar with (*id.* 698) while claiming that his afternoon cleaning schedule was 12:30 PM to 2:30 PM (*id.*). At his deposition—inferentially and construed in the light most favorable to Morrison—Santos implied a different timeframe of 1:00 PM to 3:30 PM. (*Id.* 706). Collectively, Santos's affidavit testimony differs (express and inferentially) on multiple material facts demonstrating, contrary to NYCHA's suggestion here, that his affidavit was not harmlessly redundant to his deposition testimony.

Changes in Santos's oral and written testimony highlight a significant policy concern. A non-native speaker demanding an interpreter for his deposition should be required to stay consistent thru the case in the manner of his testimony. Likewise, an affirmation from trial counsel attesting to his belief, that in preparing and executing the affidavit, that Santos "was able to communicate with [trial counsel] in English *sufficiently* to understand the information contained in his affidavit" is a dubious proposition. (*Id.* 796 (emphasis added)). If, for example, Santos—NYCHA's principal witness—is confronted at trial with the changes in his testimony and claims he did not "sufficiently" understand NYCHA's trial counsel during the execution of his affidavit, trial counsel can feasibly become a material witness in this case placing him on the fringes of multiple disciplinary rule

violations. *See, e.g.*, Rules of Professional Conduct Rule 3.7(a) (Advocate-Witness Rule), Rule 8.4(d).

III. NYCHA CONFLATES THE ADMISSIBILITY OF MORRISON'S EXPERT TESTIMONY WITH THE WEIGHT THAT THE FACT FINDER MAY GIVE IT

In opposition to NYCHA's motion for summary judgment, Morrison tasked professional engineer Stanley H. Fein, P.E. ("Fein"), to perform friction coefficient testing on the subject step in order to determine whether it violated the accepted safety standards in the American Society for Testing and Materials and Underwriters Laboratories. Fein performed such testing and confirmed that under wet conditions the stairs, because of the gray paint applied by NYCHA, violated these standards. Annexed to Fein's report was a photograph of the staircase involved in this accident. Morrison averred, separately, that this photograph fairly and accurately depicted the staircase as it appeared at the time of his accident. (R. 779-780). This establishes the foundation for expert testing and testimony.

NYCHA's brief advances a series of bombshell arguments that are, largely, bombast. And at its core NYCHA's arguments may be relevant to the weight of the evidence but do not negate its admissibility. For example, NYCHA claims Fein "may have created a hydroplane condition . . . which would have artificially lowered the coefficient of friction." (NYCHA Br. 24). This speculation is, of course, appropriate for summation and is not dissimilar to criticisms of experts that

base testimony on visual, rather than in-person, inspections. *Gary v. Country Club Acres, Inc.*, 47 A.D.2d 788, 788, 366 N.Y.S.2d 57, 58 (1975). Furthermore, NYCHA's claim that Morrison did not know what step he slipped on is disingenuous when NYCHA acknowledged in its underlying summary judgment motion that "[p]laintiff only got to the first step below the landing before his leg slipped." (R. 26 ¶ 14). This is, of course, consistent with the location tested by Fein and confirmed by Morrison in his affidavit confirming Fein's inspection photograph. (*Id.* 777, 780). Finally, NYCHA's criticism of Fein that he has, over the course of a multi-decade career, been precluded is skillful distraction. Many of the parenthetical citations—including one for friction coefficient—noted that Fein cited "no authority." (NYCHA Br. 27). Here, Fein cited two accepted safety standards that can platform a negligence claim.

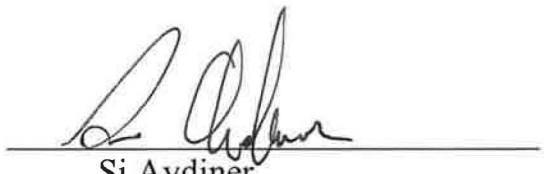
CONCLUSION

For the reasons stated above, the First Department's decision and order should be reversed and this matter remanded for a trial on liability and damages.

Dated: August 22, 2023
Mineola, New York

Respectfully submitted,

Wiese & Aydiner, PLLC



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State of New York }
County of Kings }

GREGORY MORRISON,

v.

NEW YORK CITY HOUSING AUTHORITY.

Chris Katsimagles being duly sworn, deposes and says that he is over 18 years of age, and is not a party to the action, on Friday, August 25, 2023 deponent served 3 copies of the within Brief upon

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Sworn to before me
Friday, August 25, 2023

WILLIAM BAILEY
Notary Public, State of New York
No. 01BA6311581
Qualified in Richmond County
Commission Expires Sept. 15, 2026

Chris Katsimagles
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