

Welliver v T-C the Colorado, LLC

2024 NY Slip Op 31591(U)

May 6, 2024

Supreme Court, New York County

Docket Number: Index No. 155126/2014

Judge: James d'Auguste

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. James E. d'Auguste

PART 55

Justice

-----X
KATHY WELLIVER,

Plaintiff,

- v -

T-C THE COLORADO, LLC, DERMOT REALTY
MANAGEMENT CO., INC., HERCULES CORPORATION,
WHIRLPOOL CORPORATION, MAYTAG SALES, INC., and
MAYTAG ENTERPRISES, INC.,

Defendants.
-----X

INDEX NO. 155126/2014

MOTION DATE 12/02/2022,
12/02/2022,
12/02/2022

MOTION SEQ. NO. 005 006 007

**DECISION + ORDER ON
MOTION**

HERCULES CORPORATION,

Plaintiff,

-against-

WHIRLPOOL CORPORATION, MAYTAG SALES INC.,
MAYTAG ENTERPRISES INC.,

Defendants.
-----X

Third-Party
Index No. 595331/2016

The following e-filed documents, listed by NYSCEF document number (Motion 005) 37, 40, 42, 44, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 185, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 254, 257, 258

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 37, 40, 42, 44, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 186, 231, 255, 259

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 37, 40, 42, 44, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 256, 260, 261

were read on this motion to/for

SUMMARY JUDGMENT

In motion sequence 005 defendant Hercules Corporation (“Hercules”) moves for summary judgment pursuant to CPLR § 3212 to dismiss the complaint, and the motion is opposed by plaintiff Kathy Welliver (“plaintiff”). In motion sequence 006, defendants and third-party defendants Whirlpool Corporation (“Whirlpool”) and Maytag Sales Inc. (“Maytag Sales”) submit an unopposed motion for summary judgment pursuant to CPLR § 3212 to dismiss the complaint and cross-claims. In motion sequence 007, defendants T-C the Colorado (“Colorado”) and Dermot Realty Management Co. Inc. (“Dermot”) move for summary judgment pursuant to CPLR § 3212 dismissing the complaint, which plaintiff opposes. In the same motion, Colorado and Dermot move for summary judgment on their cross-claims for contractual indemnification and breach of contract against Hercules. Hercules cross-moves for summary judgment dismissing Colorado and Dermot’s cross-claims against it. The court decides the motions as follows.

Background

Plaintiff resided in a residential apartment building, which was owned by Colorado and managed by Dermot (amended complaint, NYSCEF Doc No. 37 ¶¶ 1, 17, 18). On September 29, 2013, plaintiff slipped and fell in the laundry room of her apartment building as a result of “an accumulation of liquid that was permitted to chronically accumulate and remain on the laundry room floor for an unreasonable period of time” (*id.* ¶ 28). Maytag Sales, Maytag Enterprises Inc. (“Maytag Enterprises”), and Whirlpool were vendors of washing machines to Hercules, which in turn supplied the machines to the apartment building (*id.* ¶ 20).

In her amended complaint, plaintiff asserts negligence claims against Colorado, Dermot, Maytag Sales, Maytag Enterprises, Whirlpool, and Hercules. Hercules asserts cross-claims against Colorado and Dermot for liability for plaintiff’s injuries (Hercules Answer, NYSCEF

Doc No. 3 at 3-6). Maytag Sales asserts cross-claims against Colorado and Dermot for liability for plaintiff's damages and contends that Maytag Sales bears secondary and/or derivative liability only (Maytag Sales Answer, NYSCEF Doc No. 40 at 7-8). The answer also responds to claims that plaintiff asserted against Maytag Enterprises. Similarly, Whirlpool asserts cross-claims against Colorado and Dermot for liability for plaintiff's damages and argues that Whirlpool bears secondary and/or derivative liability only (Whirlpool Answer, NYSCEF Doc No. 42 at 7-8). Colorado asserts cross-claims against Hercules that Hercules is liable for any negligence that allegedly caused plaintiff's injuries (Colorado Answer, NYSCEF Doc No. 44 ¶ 100). Dermot cross-claims 100).

Discussion

Motion Sequence 005

Hercules' motion is for summary judgment to dismiss the complaint as against it. A plaintiff demonstrates a successful negligence claim by establishing a duty owed by the defendant, a breach thereof, and injury proximately resulting from the breach (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]; see *Mangual v. U.S.A. Realty Corp.*, 63 AD3d 493, 638 [1st Dept 2009] [requiring a showing of exclusive control]). Hercules argues that it did not owe a duty to the plaintiff; therefore, it cannot be liable for plaintiff's injuries.

"Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Authority of New York*, 17 AD3d 252, 254 [1st Dept 2005]). Colorado granted Hercules a license to "install, operate and maintain laundry equipment" (License, NYSCEF Doc No. 125 at 1). The license states that Hercules "may use the Premises solely for the installations and operation of the 'Equipment'"

(*id.*). Thus, the license agreement does not confer exclusive control of the laundry to Hercules; instead, Hercules had to respond to repairs within twenty-four hours of notice under the license agreement (NYSCEF Doc No. 125 ¶ 8). The call logs indicate that the last time Hercules received notice of an issue prior to plaintiff's accident was on August 15, 2013, over a month prior to plaintiff's accident (NYSCEF Doc No. 136). Based on the call logs, Hercules' director of operations, Steve Beckerman, testified that there were no reports of leaks (Beckerman deposition transcript, NYSCEF Doc No. 126 at 46). This is also supported by Hercules' service tech, George Ledson, who testifies he was never aware of any leaks at any time at the apartment building (NYSCEF Doc No. 127 at 14). Because Hercules did not have occupancy, ownership, control, or special use of the laundry room, Hercules does not bear liability.

Instead of challenging Hercules' position that it lacked occupancy, ownership, control or special use of the premises, plaintiff contends that "defendants Colorado/Dermot and Hercules had actual and constructive notice of a recurrent condition of leaks from the washers and water connections in their common laundry room" (*id.* at 18). As this is irrelevant to Hercules' duties under the license, the Court does not reach plaintiff's argument, and instead grants the motion and dismisses the complaint with respect to Hercules.

Motion Sequence 006

Whirlpool and Maytag Sales move for summary judgment to dismiss the complaint and cross-claims against them, which is unopposed. Further, plaintiff asserts that she does not oppose the motion as it relates to Maytag Enterprises, as well (plaintiff affirmation, NYSCEF Doc No. 231 at 1). As such, the Court grants the motion to dismiss the complaint and cross-claims against Whirlpool, Maytag Sales, and Maytag Enterprises.

*Motion Sequence 007**a. Summary Judgment Motion to Dismiss the Complaint*

Colorado and Dermot (defendants) move for summary judgment to dismiss the portions of the complaint that relate to them. In a negligence action, “[t]he plaintiff must first demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury” (*Boderick v R.Y. Mgt. Co. Inc.*, 71 AD3d 144, 147 [1st Dept 2009]). Plaintiff argues that defendants had constructive notice of the washing machines leaking, and defendants counter, stating that they had no actual or constructive notice of a wet condition caused by washing machine leaks.

Plaintiff provides the deposition testimony of Amanda Shaffer, a fellow resident, to support her claim that defendants had constructive notice of the ongoing wet condition caused by the allegedly leaking machines. Shaffer testifies that she often saw a wet floor sign in the laundry room, and warned other residents that the machines were leaking (Shaffer deposition transcript, NYSCEF Doc No. 241 at 17, 26-27). She reported water on the laundry room floor to maintenance a few weeks prior to plaintiff’s accident, when she noticed there was no wet floor sign (*id.* at 34-36). Shaffer did not testify as to what she believed caused the water. Plaintiff also submits a registered architect, Scott Cameron’s, affidavit in support (NYSCEF Doc No. 211). Cameron opined that the laundry room floor is unsafe when wet and categorized the area of the slip and fall as “dangerous” based on testing.

On a motion for summary judgment, an “opposing party to produce evidentiary proof in admissible form sufficient to raise a material issue of fact,” and “conclusory assertions...are wholly insufficient” (*Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325 [1st Dept 2004]). Shaffer’s deposition testimony and Cameron’s affidavit create a question of fact as to

whether defendants had notice of allegedly leaking machines (*see Johnson v Goldberger*, 286 AD2d 604, 606 [1st Dept 2001]). As such, plaintiff has raised a question of fact as to whether defendants had actual or constructive notice; hence, the Court denies Colorado and Dermot's motion for summary judgment on the complaint.

b. Summary Judgment Motions on Cross-Claims

Colorado and Dermot move for summary judgment on their cross-claims for contractual indemnification and breach of contract against Hercules, and Hercules cross-moves for summary judgment dismissing the cross-claims. The license agreement states:

Licensee shall indemnify and save harmless Licensor and its agents, officers, and employees against and from any and all claims, costs or expenses . . . (i) arising from (x) the use, conduct or management of any portion of the Premises or of any business therein by Licensee or its employees and invitees, or (y) any work or thing whatsoever done, or any condition created by Licensee, in or about any portion of the Premises during the term of this License Agreement or any other portion used by Licensee, or (ii) arising from the negligence . . . of Licensee (which for the purposes hereof shall include . . . a breach of the obligations of Licensee under this license Agreement). (NYSCEF Doc No. 194 ¶ 17).

At issue here is whether the wet conditions contributing to plaintiff's slip and fall were caused by leaking washing machines or by other means, such as water dripping from clothing as tenants moved items from the washers to dryers. According to the license agreement, Hercules is liable to indemnify Colorado from costs arising from "the use, conduct or management of any portion of the [laundry room]." Because it has not been determined what caused the wet conditions in the laundry room, the Court cannot determine whether the license's indemnity cause is triggered. As such, the Court denies the motions for summary judgment on the cross-claims.

Accordingly, it is hereby

ORDERED that Hercules' motion for summary judgment (mot. seq. 005) is granted, and the complaint is dismissed as against Hercules; and it is further

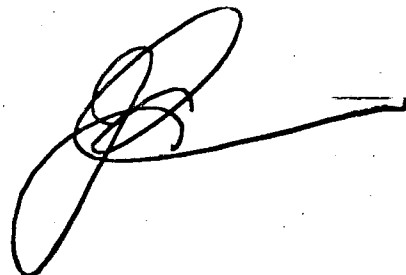
ORDERED that Whirlpool and Maytag's motion for summary judgment (mot. seq. 006) is granted and the complaint is dismissed as against Whirlpool and Maytag; and it is further

ORDERED that Colorado's and Dermot's motion for summary judgment to dismiss the complaint (mot. seq. 007) is denied; and it is further

ORDERED that Colorado's and Dermot's motion for summary judgment (mot. seq. 007) on its cross-claims is denied; and it is further

ORDERED that Hercules' cross-motion for summary judgment (mot. seq. 007) on the cross-claims against it is denied.

This constitutes the decision and order of the Court.



5/6/2024
DATE

James d'Auguste, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	
			<input type="checkbox"/>	DENIED		