

Rocco v Prism Management-Co.

2003 NY Slip Op 30091(U)

January 17, 2003

Supreme Court, New York County

Docket Number: 0117984/1995

Judge: Martin Schoenfeld

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

-----X
BRIAN ROCCO,

Plaintiff,

Action No. 1

-against-

Index No. 117984/95

PRISM MANAGEMENT-CO., 320 EAST 54TH
STREET CONDOMINIUM OWNERS, TANYA
RUDENJAK, as Executrix of the Estate of
VLAHO RUDENJAK, Deceased, THE
:CONDOMINIUM BOARD OF 320 EAST 54TH STREET
CONDOMINIUM, O'MARIE CHAING, KATHRYN LU,
HOWARD SCHECTER, ROBERT PEARSON, AVI
BAHIR, BERNARD FRIEDMAN, TERI FRIEDMAN,
and JUDITH WAINE,

DECISION AND ORDER

005

Defendants.

-----X
TANYA N. RUDENJAK, as Executrix of the
Estate of VLAHO RUDENJAK, Deceased,

Plaintiff,

Action No. 2

-against-

Index No. 3127821/95

PRISM MANAGEMENT CO. and 320 EAST 54TH
STREET CONDOMINIUM OWNERS,

DECISION AND ORDER

Defendants.

-----X
THE AETNA CASUALTY & SURETY COMPANY as
subrogee of Maryann Mansolillo and
Jeanette Seldis,

Plaintiff,

Action No. 3

-against-

Index No. 21889/96

TANYA N. RUDENJAK, as Executrix of THE
ESTATE OF VLAHO RUDENJAK, FRIEDMAN
MANAGEMENT, PRISM MANAGEMENT and 320
EAST 54TH STREET CONDOMINIUM OWNERS, INC.,

DECISION AND ORDER

Defendants

-----X

-----x
NATASHA RUDENJAK,

Plaintiff,

Action No. 4

-against-

Index No. 113213/97

PRISM MANAGEMENT, CO., 320 EAST 54TH
STREET CONDOMINIUM OWNERS ASSOCIATION and
TANYA RUDENJAK, as Executrix of the
Estate of VLAHO RUDENJAK, Deceased,

DECISION AND ORDER

Defendants

-----x
MICHAEL ROOPNARINE,

Plaintiff,

Action No. 5

-against-

Index No. 102503/98

54th STREET ASSOCIATES, THE 320 EAST 54TH
STREET CONDOMINIUM and VLAHO RUDENJAK,

DECISION AND ORDER

Defendants

-----x
TRAVELERS INDEMNITY COMPANY OF ILLINOIS,
As subrogee of Friedman Management Co.
and others,

Plaintiff,

Action No. 6

-against-

Index No. 110489/98

THE ESTATE OF VLAHO RUDENJAK, TANYA N.
RUDENJAK, as Executrix of THE ESTATE OF
VLAHO RUDENJAK, NATASHA RUDENJAK, and
MICHAEL SINGH a/k/a AHMAD SINGH,

Defendants

-----x
PRISM MANAGEMENT, CO., 320 EAST 54TH
STREET CONDOMINIUM OWNERS, et al.,

Third-party Action

Third-party Plaintiffs,

Index No. 591640/99

-against-

BALAC CONSTRUCTION CORP.,
Third-party Defendant.

-----x

Martin Schoenfeld, J.:

In these consolidated actions plaintiffs seek to recover for personal injuries, wrongful death, and property damage caused by a fire on June 18, 1995 at 320 East 54th Street, New York, New York, a 12-story condominium apartment building ("the Building"). The claims against the owner (320 East 54th Street Condominium Owners ("the Condo Owners")); the board of directors (The .:CondominiumBoard of 320 East 54th Street Condominium ("the Condo Board")); the individual directors (O'Marie Chaing, Kathryn Lu, Howard Schechter, Robert Pearson, Avi Bahir, Bernard Friedman, Teri Friedman and Judith Waine); the management company at the time of the fire (Prism Management Co. ("Prism")); and a prior management company (Friedman Management Company ("Friedman Management")) are based on two theories: that they are responsible for the fact that the apartment did not have a working smoke detector; and that firefighters attempting rescue operations were delayed by a blocked or inoperable door to the roof.

The aforesaid defendants now move for summary judgment dismissing all claims and cross-claims against them on the following grounds: they were not responsible for any lack of a smoke detector; there was a smoke detector at some point, and they were not responsible if it was not present or not functioning at the time of the fire; that the lack of a smoke detector was not the proximate cause of the injuries alleged; and

that there is no admissible evidence that firefighters were delayed by a blocked or inoperable door.

For the reasons set forth herein, the motion is granted.

Basic Background

In November 1987 Vlaho Rudenjak ("Vlaho") bought apartment 10G (the "Apartment") in the Building. Contemporaneously, he sought and received permission from the Condo Board to renovate the Apartment. Friedman Management Company managed the building at that time; Prism took over in or about January 1994.

Very simply put (see Moving Exhibit F for details), the two largest rooms in the apartment were a living room and a bedroom, separated from each other by a partition wall. At one end each room had a window, and at the other end each room had access to a short hallway leading to the front door.

In the morning hours of June 18, 1995, a fire occurred in the Apartment. Four persons were present: Vlaho; his daughter, Natasha Rudenjak ("Natasha"), who also lived in the Apartment; Brian Rocco ("Rocco"), who was Natasha's boyfriend; and Michael Roopnarine ("Roopnarine"), an acquaintance of Vlaho's. Natasha has testified that the night before the fire she and Rocco sat on the living room sofa watching television and smoking cigarettes. The Fire Department's fire report indicates that the fire originated in the "upholstered sofa" in the living room as a result of "abandoned, discarded material, cigarette, etc." It

also indicates the absence of a smoke detector in the Apartment. When the four persons present fell asleep, Vlaho and Roopnarine were in the living room, and Natasha and Rocco were in the bedroom.

Natasha states that she woke up smelling "gas," and that Vlaho then appeared, screaming, in the bedroom doorway. Rocco awoke and stayed in the bedroom as Natasha ran to the front door. For reasons that are not clear (perhaps because of a faulty lock; perhaps because the door and lock were heating and expanding; perhaps because she was panicking) Natasha was unable to open the front door, which was the only safe means of escape from the inferno. She returned to the bedroom, and she and Rocco opened the window and stepped out onto the ledge. With a boost from Rocco, Natasha climbed up a sheet that her upstairs neighbors had lowered from their terrace. Rocco grabbed the sheet just as firefighters were arriving, or about to arrive, on the terrace to attempt what is known as a roof rope rescue. However, Rocco could not maintain his grip on the sheet, and he fell to the ground below, sustaining very serious injuries. Vlaho perished in the fire, and Roopnarine passed out but was rescued.

At her deposition, Natasha stated that, although she did not know whether a smoke detector was present in the Apartment on the date of the fire, she specifically recalled having observed, on several earlier occasions, a round, plastic smoke detector affixed to the ceiling of the entrance hallway, near a kitchen

that was off to one side. As Natasha never saw the Apartment before Vlaho's renovation, the moving defendants argue that she must have observed the smoke detector after the renovation. She also testified that the smoke detector had "gone off" on several occasions when she was in the Apartment, once when toast was burning and once when Vlaho was cooking for a dinner party for five or six people who were present in the apartment. On both occasions Vlaho climbed a chair and silenced the alarm. The Building's superintendent, Bob Kucevic, who occasionally visited with Vlaho socially, also testified that there was a smoke detector in the Apartment after the completion of the renovation work. However, Tanya Rudenjak, another daughter of Vlaho's, asserts that, to the best of her knowledge and present memory, she never saw a smoke detector in the Apartment. She states that she lived in the Apartment from 1993 until 1995 and visited regularly when she did not live there.

Procedural History

On November 15, 1995, Tanya N. Rudenjak, as Executrix of the Estate of Vlaho Rudenjak, commenced an action against Prism and the Condo Owners. On July 18, 1996, Rocco commenced an action against Prism; the Condo Owners; Tanya Rudenjak, as Executrix of the Estate of Vlaho Rudenjak; the Condo Board; and the individual board members. On July 26, 1996, Aetna Casualty and Surety Company commenced a subrogation action against the Estate of

Vlaho Rudenjak, Friedman Management, Prism, and the Condo Owners, seeking to recover for property damage purportedly sustained to a neighboring apartment in the Building.

On July 9, 1997, Natasha commenced an action against Prism, the Condo Owners, and Tanya Rudenjak, as Executrix of the Estate of Vlaho Rudenjak. On February 5, 1998, Roopnarine commenced an action against "320 East 54th Street Associates," "320 East 54th Street Condominium" (both of whom allegedly owned or managed the building), and Vlaho. On June 12, 1998, Travelers Indemnity Company of Illinois commenced a subrogation action against Vlaho's Estate, Tanya Rudenjak, Natasha, and Roopnarine, seeking to recover for property damage purportedly sustained to the Building. All actions were consolidated for joint discovery and trial. On October 27, 1999, the moving defendants commenced a third-party action for common law indemnification and for contribution against Balac Construction Corp ("Balac").

Discussion

Smoke Detection

New York City Administrative Code § 27-2045 provides, as here relevant, that in Class A multiple dwellings:

- a. It shall be the duty of the owner . . . to:
 - (1) provide and install one or more approved and operational smoke detecting devices in each dwelling unit. . . .
 - (2) post a notice . . . in a common area of the building informing the occupants . . . that the owner

is required by law to install one or more approved and operational smoke detecting devices in each dwelling unit in the building and that each occupant is responsible for the maintenance and repair of such devices and for replacing any or all such devices which are stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit.

(3) replace any smoke detecting device which has been stolen, removed, missing or rendered inoperable during a prior occupancy of the dwelling unit and which has not been replaced by the prior occupant prior to the commencement of a new occupancy of a dwelling unit.

. . .
b. . . . it shall be the sole duty of the occupant of each dwelling unit in a class A multiple dwelling in which a smoke detecting device has been provided and installed by the owner pursuant to the provisions of article six of subchapter seventeen of chapter one of this title to:

(1) keep and maintain such device in good repair; and
(2) replace any and all devices which are either stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit.

c. Except as otherwise provided in paragraphs three and four of subdivision a of this section, an owner of a class A multiple dwelling who has provided and installed a smoke detecting device in a dwelling unit pursuant to this section shall not be required to keep and maintain such device in good repair or to replace any such device which is stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit.

Thus, even assuming that the Condo Owners, rather than Vlaho, was the "owner" of the Apartment, none of the moving defendants would have had any obligation vis-a-vis a smoke detector if a detector had been in the apartment at any time after Vlaho's 1987 renovation.' Even in the context of a rental building, once an owner has provided and installed an operational

¹ If the city or state legislature had intended that condominium owner corporations be responsible for smoke detector placement and maintenance, simple legislation to that effect could have been enacted.

smoke detector in an apartment, it is the duty of the occupant of the apartment to keep and maintain it in good repair, and to replace any smoke detector which is stolen, removed, missing, or becomes inoperable. ~~Acevedo v Audubon Mgt., Inc.~~, 280 AD2d 91 (1st Dept 2001).

In the instant case, Natasha's detailed testimony about the existence of a smoke detector, including what it looked like, how it "went off," and how Vlaho responded when it "went off," testimony that is buttressed by the superintendent's recollection that a smoke detector existed, conclusively establishes that such a detector was in the Apartment after the renovation.² Tanya's statement that she never saw smoke detectors in the Apartment, and the Fire Department reports that none were found, can be taken as true without contradicting the testimony of Natasha; Tanya may not have seen it, and in any event Vlaho may have removed it in the seven years between the renovation and the fire (especially as it "false alarmed" at least twice due to kitchen activity).

Thus, the Apartment had a functioning smoke detector prior to the fire; the obligation to continue to have a smoke detector in working order belonged to Vlaho, the resident and owner of the Apartment; and the Condo Owners, the Condo Board, and the other

² Natasha Rudenjak's position as a plaintiff suing the Condo owners and Prism (and as subrogation defendant being sued by Travelers) obviously provides her with a disincentive to fabricate fanciful stories about a non-existent smoke detector "going off."

moving defendants cannot be held liable for any lack of a functioning detector at the time of the fire.³

Rescue Attempt

Rocco seeks to hold the moving defendants liable for the injuries caused by his fall on the ground that they delayed the Fire Department's rescue attempt. This Court will assume, solely for purposes of the instant argument (and as appears to be the case), that if firefighters sent to rescue Rocco had reached him sooner, they would have been able to prevent his fall. Rocco's theory is premised on the contention that certain firefighters attempted to gain access to the roof, and that they were prevented from doing so by a blocked or inoperable door.

However, the only basis for this theory is the half-page affidavit of Rocco's brother-in-law, Frank S. Pullano ("Pullano"), a retired New York City Police Detective. Pullano states that firefighters at the scene told him that the rescue efforts were impaired by their inability to get onto the roof in a timely manner. There are two problems with this account of events.

³ Having determined that a functioning smoke detector existed at some point in time between the renovation and the fire, this Court need not and does not reach the interesting issues of whether the moving defendants could have been liable if a post-renovation smoke detector had never existed and whether the opponents of the instant motion have raised a factual issue as to proximate cause, compare Acevedo v Audubon Mgt., Inc., 280 AD2d 91 (1st Dept 2001) (finding no proximate cause based on absence of smoke detector) with Lein v Czaplinski, 106 AD2d 723 (3d Dept 1984) (finding proximate cause).

First, it is based solely on hearsay statements by unidentified declarants. Although hearsay statements by identified declarants can be considered in opposition to a motion for summary judgment, statements by unidentified declarants are inadmissible. Landisi v Beacon Community Dev. Agency, 180 AD2d 1000 (3d Dept 1992). Pullano's affidavit does not identify the declarants.

Second, all the available, admissible evidence suggests that the Fire Department rescue team was directed to the terrace above the Apartment, not to the roof.⁴ Fire Captain Gennaro William Bonfinglio ("Bonfinglio"), who was in charge of the rescue attempt, testified that the rescue procedure the firefighters were about to attempt is known as a "roof rope rescue," no matter where it is performed, and that there was no attempt to get on the roof; rather, he directed the firefighters to the 11th floor, and they would have initiated the "roof rope rescue" from there. Moreover, the Fire Department's report, completed by firefighters McBride and Pilner, confirms Bonfinglio's statement, as it says, "ROOFMAN AND OVM TO APT. 11E, INITIATED ROOF ROPE RESCUE ATTEMPT," and does not indicate any attempt to reach the roof of the Building.

Rocco argues that before the moving defendants can be granted summary judgment, he should be allowed to depose the fire

⁴ Indeed, it is hard to imagine how a rescue team on the roof could have negotiated its way around the terrace directly above the ledge from which Rocco fell.

fighters that allegedly spoke to Pullano. He also points out that the instant motion was made before a note of issue was filed. As to the former, the fire occurred more than six year before the instant motion was submitted. This surely was enou time to have made all reasonable attempts to locate uniformed firefighters present at a significant fire.⁵

[A] party opposing [a summary judgment] motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose.

Gilbert Frank Corp v Federal Ins. Co., 70 NY2d 966, 967 (1988)

(citations omitted). As to the latter, this court's March 5, 2002 disclosure Order does not mention further depositions of firefighters, but it directs plaintiffs to file a Note of Issue by June 4, 2001, only two weeks after the instant motion was served.

Conclusion

Brian Rocco was both a hero and tragic victim of the subject fire. He saved his girlfriend's life before being grievously injured. However, the moving defendants did not cause the fire;

⁵ The New York Times covered the fire. See Opposition Exhibit V. Interestingly, the Times article mentions "firefighters on the roof prepared to scale down the wall with ropes to reach" Rocco, but does not mention any delay in reaching the roof. A Captain John Brennan said that he was on the 11th floor balcony but that Rocco was about five feet below his grasp. The Times article is, of course, unsworn, and based largely on hearsay.

were not responsible for the absence of a working smoke detector, which was present before the fire; and did not cause, for all the admissible evidence shows, any delay in the Fire Department's rescue attempts. As no basis of liability against them exists, the moving defendants are entitled to summary judgment.

The clerk is hereby directed to (1) sever all claims and cross claims against defendants 320 East 54th Street Condominium :Owners, the Condominium Board of 320 East 54th Street Condominium, O'Marie Chaing, Kathryn Lu, Howard Schecter, Robert Pearson, Avi Bahir, Bernard Friedman, Teri Friedman, Judith Waine, Prism Management Co., and Friedman Management Company from all other claims and cross-claims; and (2) to enter summary judgment dismissing all claims and cross-claims against these defendants.

The clerk is also hereby directed to enter judgment dismissing the third-party complaint against Balac Construction Corp.

This opinion constitutes the Court's decision and order.

Dated: *January 17, 2003*


J.S.C.