Allen v Back Street, LLC
2005 NY Slip Op 30095(U)
December 12, 2005
Supreme Court, Kings County
Docket Number: 3004100/2001
Judge: Sylvia O. Hinds-Radix
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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civil Center, Brooklyn, New York, on the 12th Day of December 2005

PRESENT
HON. SYLVIA HINDS-RADIX,
Justice

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CHARLES RAY ALLEN and LILLIAN ALLEN,

Plaintiffs,

Index No.41001/01

-against

BACK STREET, LLC

Defendant.

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The following papers numbered 1 to 3 read on this motion: Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers	

In this action, plaintiff seeks to recover damages for personal injuries he sustained when he fell on defendant's premises, allegedly due to a hazardous condition. At trial, plaintiff Charles Ray Allen testified that his injuries were sustained while he was in the course of his employment at the Hempstead Park Nursing Home, the lessee of the premises owned by the defendant, Back Street LLC. Plaintiff stated that he was instructed by his supervisor to cut some hedges on the premises, and in preparation to cut the hedges, he placed a ladder on a window grating which was near the hedge. Plaintiff alleged that the window was in a defective and dangerous condition, and it collapsed causing him to fall and injure himself.

During the trial, defense counsel orally moved for dismissal of plaintiff's complaint and was advised by the court to submit a written motion. Plaintiff's counsel submitted motion

papers in opposition to defendant's motion.

Notice of Alleged Dangerous/Defective Condition

Defendant has made a motion to dismiss plaintiff's cause of action as a matter of law in that plaintiff has failed to establish that defendant had notice of a defective or dangerous condition, either through actual notice or constructive notice.

To prove actual notice, the plaintiff must prove that the defendant knew that the defect or dangerous condition existed. To prove constructive notice, the plaintiff must show that the defect was visible and apparent, and existed for a sufficient length of time prior to the accident for the defendant to discover and remedy it (*see, Gordon v. American Museum of Natural History*, 67 NY 2d 836; *Negri v. Stop and Shop*, 65 N.Y.2d 625; *Lewis v. Metropolitan Transit Authority*, 64 N.Y.2d 670).

At trial, defendant testified that he did not have actual notice that the window grating was defective. Defendant also asserted that a latent defect does not create constructive notice. Constructive notice is not to be imputed where a defect is latent and would not be discoverable upon reasonable inspection (see, *Curiale v. Sharrotts Woods Inc.*, 9 A.D.3d 473; *Lee v. Bethel First Pentecostal Church of America*, 304 A.D.2d 798). Defendant's witness, Mr. Melnick, testified that he did look at the grates when he purchased the building, and that he sent his head of maintenance to inspect the building, but no issues with the window grates were found. Pictures were admitted into evidence to highlight the condition of the window grates.

In opposition, plaintiff argues that the trial evidence shows that the defect of the grating was not latent but structural. Plaintiff asserts that the grating did not fit the well, and that the disparity in the size of the grate and the size of the window well created a hazardous condition. Plaintiff's expert witness, Mr. Fein, testified that he noticed that the grating was not the right size as soon as he looked at it. Sufficient admissible testimony and evidence in the form of

pictures have been admitted into evidence which created a triable question of fact for the jury as to whether the defendant had actual or constructive notice of the dangerous condition allegedly created by the grating system, and whether the condition of the grating could be considered latent or discoverable upon reasonable inspection (see, *Collins v. Mayfair Super Markets*, 13 A.D.3d 330). Accordingly, defendant's motion for dismissal on the basis of failure to establish that the defendant had notice of an alleged dangerous or defective condition is denied.

Duty to the Plaintiff

Defendant has made a motion to dismiss plaintiff's cause of action, as a matter of law, on the grounds that plaintiff has failed to establish that defendant owed a duty to the plaintiff. Defendant asserts and courts have previously ruled that a landlord is not liable for injuries to a third party, and that they do not become liable simply by reserving the right to re-enter the premises to inspect and make repairs (see, *Ortiz v. RVC Realty*, 253 A.D.2d 802; *Popovskaya v. Kings Delight, Inc*, 288 A.D.2d 283; *Felder v. Wank*, 227 A.D.2d 442).

Based upon defendant's testimony and in the memorandum provided by plaintiff, it is clear that the lease agreement, between defendant Back Street LLC and the non-party lessee Sunshine Care Corporation, provides that the defendant has the right to re-enter the property at all reasonable times to inspect the premises and make repairs. As the lessor of the property, this does not, in itself, create a duty to the plaintiff.

However, in cases where there is a reservation of the right to enter the premises, the landlord may be held liable if it can be established that the landlord retained sufficient control over the premises to render it liable for the injury (see, *Pellegrino v. Walker Theatre*, 127 A.D.2d 574, 575; *O'Neill v. Port Authority*, 111 A.D.2d 375, 377). During testimony by Mr. Melnick and in the memorandum of law submitted by defendant, Mr. Melnick admitted that the

majority of the nursing home was run by him. In addition, Mr. Melnik testified to the fact that he signed the lease on behalf of Sunshine Care Corporation and on behalf of Back Street LLC. It would seem, based on the testimony of the defense witness, that the owner's representative, Mr. Melnick, retained great control over the premises, as he also functioned as an authorizing signature for Sunshine Care Corporation. Therefore, defendant could be held liable for the injuries suffered by the plaintiff, based on their duty. Defendant's motion for dismissal on the basis of failure to establish that the defendant owed a duty to the Plaintiff, is denied.

Workers' Compensation Law

Defendant has made a motion requesting that plaintiff's cause of action be dismissed as a matter of law because the cause of action is barred by the Workers' Compensation Act. According to defendant, plaintiff has argued that the defendant owed a duty to the plaintiff because Michael Melnick is the majority shareholder of the defendant corporation Back Street LLC, and the Majority shareholder of the non-party lessor, Sunshine Care Corporation, which is the employer of the plaintiff. Defendant asserts that if defendant is found to be liable based on the fact that Michael Melnick is the principal shareholder of both corporations, then the Court must find that the defendant is an alter ego of Sunshine Care Corporation. This would mean that any recovery on the part of the plaintiff is barred by Workers' Compensation Law (see, *Worker's Compensation Law sec 11*; *Dennihy v. Episcopal Health Services, Inc.* 283 A.D.2d 542; *Allen v. Oberdofer Foundries, Inc.* 192 A.D.2d 1077, 595 N.Y.S.2d 995; *Carusone v. Three Centers Assoc.*, 124 A.D.2d 317).

In order for a corporation to be considered a subsidiary of another corporation, the alleged parent corporation must exercise complete domination and control of the subsidiary's day to day operations. This must be set forth in a prima facie case of evidence of the complete

domination by the parent corporation. Evidence that two companies are related is not considered sufficient evidence of an alter ego relationship (see, *Dennihy v. Episcopal Health Services*, 283 A.D.2d 542; *Allen v. Oberdorfer Foundries, Inc*, 192 A.D.2d 1077).

Defendant has the burden of proving this prima facie case by a preponderance of credible evidence (see, *Williams v. Frobes*, 175 A.D.2d 125,126; *Donatin v. Sea Crest Trading Co.*, 181 A.D.2d 654,655; *Christopher c. Smith v. Roman Catholic Diocese of Syracuse*, 252 A.D.2d 805). Plaintiff, Charles Allen's, testified that he was solely employed by Sunshine Care Corporation and not by Back Street LLC. Defendant admits in its memorandum and Michael Melnick testified that he does not control the day to day operations of Sunshine Care Corporation, yet Mr. Melnick states that the majority of the nursing home is run by him. Finally, in the defendant's answer to the summons and verified complaint, the defendant asserts that the plaintiff should be barred from recovery based on Workers' Compensation law, as plaintiff is an employee of the defendant.

Defendant has repeatedly contradicted itself about what the relationship is between itself and plaintiff, as well as the relationship between Back Street LLC and Sunshine Care Corporation. Without credible testimony to establish that defendant is entitled to a defense under Workers' Compensation Law sec 11, this Court cannot find that defendant has met its burden of establishing this defense by a preponderance of the evidence.

Accordingly, defendant's motion for dismissal on the basis that Plaintiff's cause of action is barred by the Workers' Compensation Act, is denied.

This constitutes the order and decision of the Court.

E. N. T. E. R.

J. S. C

HON. SYLVIA O. HINDS-RADIX, JSC