

Jones v Murnane

2007 NY Slip Op 32952(U)

September 13, 2007

Supreme Court, Suffolk County

Docket Number: 0016912/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-26-07
ADJ. DATE 5-17-07

-----X
LAMERILL JONES,

Mot. Seq. # 001 - MG; CASEDISP
VLADIMIR & ASSOCIATES, P.C.
: Attorneys for Plaintiff
: 1550 Deer Park Avenue, Suite 3
: Deer Park, New York 11729

Plaintiff,

- against -

: ROBERT P. TUSA, ESQ.
: Attorney for Defendant
: 898 Veterans Memorial Hwy, Suite 320
: Hauppauge, New York 11788

MELISSA MURNANE,
Defendant.
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Upon the following papers numbered 1 to 22 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 9-18;19-20; Replying Affidavits and supporting papers; Other 21-22; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by defendant Melissa Murnane pursuant to CPLR 3212 for summary judgment, is granted and the complaint is dismissed.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when on July 9, 2002, he sliced his hand with an electrical carving knife in the kitchen of an apartment he rented in private home owned by defendant in East Setauket, New York. Plaintiff claims his injury occurred when the electricity which had gone off shortly before was unexpectedly restored while he was in the process of removing the blades from the knife. Plaintiff claims defendant was negligent in the repair and maintenance of the home's electrical system.

Defendant now moves for summary judgment on the basis that she bears no liability for plaintiff's accident. In support, defendant submits the pleadings, the transcript of the deposition testimony given by defendant, excerpts from the deposition testimony given by plaintiff and the affidavit of defendant's expert, Norman Weiss, a licensed electrician. In opposing this motion, plaintiff has submitted, inter alia, an attorney's affirmation; certificate of occupancy; affidavit of plaintiff's expert Richie Sasz; and signed copies of the transcripts of the examinations before trial of plaintiff and his wife, non-party Cher Demarco.

The proponent of a summary judgment motion 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. To grant summary judgment it must clearly appear that no material and triable issue of

fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Melissa Murnane testified that she has owned and lived in the upstairs of the house at 11 Woodchuck Lane for eight years. She purchased the house as a two family, mother-daughter house and stated the two-story house is about 35 or 36 years old and has eleven rooms. Lamerill Jones, plaintiff, was a tenant on a month to month basis, living in the downstairs portion of the house with his then girlfriend, Cher DeMarco, and their daughter.

Defendant further testified that in July, 2002, there was a circuit breaker on the first floor, located in a panel box in the kitchen. There was another kitchen on the second floor. In the first floor kitchen there was a microwave, a stove top and a refrigerator. She never had any conversations with plaintiff about the electricity going off in the house up until July, 2002, except for his having to reset the power box about five times as it would trip off or shut off while she was using her hair dryer. This would cause a loss of power in her bathroom and the downstairs living room, but the entire house never went dark. She stated she never experienced any power outages during the time plaintiff lived at the house. She did not recall any brownouts. Prior to July, 2002, she never had anyone perform any electrical work at her house.

Lamerill Jones testified, in pertinent part, that he could not remember the date in July, 2002 that he injured his hand. He testified he cut his hand about eight or ten o'clock at night with an electric knife while he was carving roast beef. He stated he received the knife as a gift from his mother, Cynthia Jones, about a month before he moved into the Murnane house. He used it about a dozen times before the incident and first used it at least two months prior to the incident.

At the time of the incident, he was using the knife to the right of the sink and plugged the knife into an outlet on the wall to the left of the sink. He stated he used that outlet everyday for the blender, microwave, household appliances and fan. He stated he pressed down on the button on the knife and proceeded to carve the turkey with his left hand. Then he stated he was carving a roast beef in a roasting pan with his left hand and moved the meat with his right hand. He did not have to press the button continuously to operate the knife, but had to press the button to turn it off. He carved about half the meat in “really no time at all,” which was about one minute, when the electricity cut off and the

knife stopped operating.

When the electricity cut out, he went to disengage the blades from the knife because he said he thought it wasn't going to come back on immediately and he had finished cutting everything that he needed at the time. Mr. Jones testified that to disengage the blade, he grabbed the blade and pulled or pushed the button, or whatever makes the blades disengage. He did not unplug the knife first before attempting to disengage the blades. He did not turn the knife off either while he was holding the blades to disengage them. The electricity came back on while he was doing this, and, he stated, the blades went through his right hand.

He testified that no power other than the knife went out at the time, and there was nothing else plugged into that outlet. He then testified that it was the outlet and the light in the bedroom that went out, and that whenever one went out, the other went out also. He testified that the electricity would go out all the time. The first time the electricity went out was the second day they were living there and Melissa came downstairs and showed him where the box was and what to do whenever this happens. He said this happened at least twice a day when he was at home. He stated it was usually a different breaker every time. He never lost all of the electricity in the apartment, just rooms or certain things. When the knife was plugged in, other than the light in the back bedroom, sometimes the TV would go out in the living room. About ninety five percent of the time the electricity in the kitchen would not come back on its own, but it would in the rest of the house. With the refrigerator, five percent of the time it would come back on, but with the microwave or appliances on the left side of the kitchen, it would never come back on. He stated the outlet in the kitchen never came back on and then stated the kitchen and bedroom outlet never came back on and always had to be reset. He testified that forty percent of the time the time the TV and lights in the den would come back on their own. Plaintiff stated that Cher DeMarco threw out the knife after the incident.

Cher DeMarco testified, in pertinent part, that they bought the knife a couple years ago, but did not know where they bought it. She did not know the name of the manufacturer. Usually plaintiff used the knife. She used the knife about five times and never experienced any difficulty with it before the accident. To use the knife, she said, it had to be plugged in. Then the top was just pressed to turn it on. The button did not have to stay depressed to keep it operating. She did not recall how the blades would be taken out.

When the incident occurred, she was in the kitchen by the stove cooking rice. She saw plaintiff assemble the knife and plug it in to the outlet on the wall in the kitchen by the microwave but did not know if he plugged it in before or after he assembled the knife. The microwave was plugged in but she was not cooking anything in the microwave. She said he was cutting the meat on a cutting board and cut four slices while they were talking. She thought he was using his left hand to cut the meat. Then all the lights went out in the house for a couple of seconds, indicating the kitchen, living room and bedroom. They waited for them to flicker back on because usually they flicker off and then flip back on again. She testified that plaintiff was going to check the circuit box in the closet in the dining room, but first grabbed the base of the knife, did not unplug the knife before he went to grab the blades to disengage them, the lights flickered on, and the knife turned on while plaintiff was taking the blades out.

She stated that prior to this time she experienced the lights going on and off maybe once a day, and would call defendant or defendant's friend Shawn who would "flicker the switch in the fuse box back on." A couple months later he taught them how to do it. She testified she would flick one or more switches about once a day. At night the lights would just flicker all the time, maybe once a day. Ms. DeMarco testified she made complaints to Ms. Murnane who said nothing.

To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury. Although it is ordinarily for the trier of fact to determine legal cause, where only one conclusion may be drawn from the established facts, the question of legal cause may be decided as a matter of law (*Howard v Poseidon Pools, Inc.*, 72 NY2d 972, 534 NYS2d 360 [1988]). In the instant action, plaintiff testified at his examination before trial that when the electricity cut out, he went to disengage the blades from the knife because he thought it wasn't going to come back on immediately and he had finished cutting everything that he needed at the time. Mr. Jones also testified that to disengage the blade, he grabbed the blade and pulled or pushed the button, or whatever makes the blades disengage. He did not unplug the knife first before attempting to disengage the blades. He did not turn the knife off either while he was holding the blades to disengage them. The electricity came back on, and the blades went through his right hand. Here, the record eliminates any legal cause other than the reckless conduct of the plaintiff, who by virtue of his familiarity with the operation of this electric knife, having finished cutting everything he needed at the time the electricity went out, decided to disengage the blades without turning the knife off or unplugging it, thinking the electricity wasn't going to come back on immediately. Plain common sense would tell plaintiff that if the electricity came back on while he was removing the blades without turning the knife off or unplugging it, such action posed the danger of injury, such as which occurred. Thus, plaintiff's conduct, rather than any negligence by defendant, was the sole proximate cause of the plaintiff's injuries. Therefore, as a matter of law, plaintiff has not demonstrated proximate cause between any alleged negligence of defendant and his injury.

Under these circumstances, defendant is entitled to an award of summary judgment. The Court further notes that even if plaintiff had raised a triable issue of fact as to the issue of proximate cause defendant established her entitlement to summary judgment by demonstrating prima facie through her expert witness' affidavit the absence of any negligence on her part due to a defective condition in the premises' electrical system. Plaintiff's expert failed to demonstrate a triable issue of fact to preclude summary judgment.

Defendant's expert, Norman Weiss, avers that he is an electrician licensed by the New York State Department of State and performed an inspection of the electrical wiring at the subject premises. As a result of that inspection, he found no problems with the wiring and found the panel was of the highest quality.

He states the outlet in the kitchen was a GFI outlet, and it is clear from the evidence of long usage that it had been there for a lengthy period of time. He stated the house was wired to code specifications that existed at the time the house was built and was fully in compliance with the codes. He states that the section of the code which plaintiff claims was violated, Section 210-11-C, only became effective in the mid 1990's and does not apply to houses built after that, and that this house was constructed before 1990. He further states that if a circuit breaker is tripped, the power could not come

back on without the breaker being reset. If the circuit breaker is not tripped, the only way that power can go off and then come on, other than if the power failure is from an outside source such as LIPA, is if there is bad wiring. However, based upon his observations and findings, there was no bad wiring in the residence.

Plaintiff's expert, Richie Sasz, states he is a licensed electrician in New York State and is experienced with installation, repair, replacement, and forensic analysis of electrical equipment, supplies and systems in residential and commercial properties throughout Long Island. He stated the residence at issue is a two family house with an apartment on the first floor in which plaintiff was a tenant. He performed two inspections of the circuit breaker and the front portions of the outlets inside the kitchen and the adjacent rooms on the first floor of the premises on July 25, 2005 and March 5, 2004.

At the July 25, 2003 visual inspection of the circuit breaker located in the living room on the first floor of the premises, he could not determine whether there were any power surges, any electrical overloads, or any other electrical problems at the premises as the court order limited him to just looking at the circuit breaker in the living room, and, he stated, the attorney for Ms. Murnane and their electrician to look at any other electrical device in the premises other than the circuit breaker on that date.¹ However, he states, on March 5, 2004, defendant's attorney and Mr. Weiss would not permit him to examine the wiring and circuits inside the electrical outlets in the kitchen, living room and dining room on the first floor. He was not permitted to examine any of the outlets on the second floor of the premises. Ms. Murnane's attorney, states Mr. Sasz, only permitted him to plug an electrical device into each outlet in the rooms.

Plaintiff's expert noted there were four outlets with a fan, a light, one microwave oven and a portable oven plugged into the outlets in the kitchen. Plaintiff's expert states he was not permitted to inspect the room above the kitchen or the wiring behind the outlet plates in the kitchen and all the adjacent rooms. He did examine the circuit breaker inside the living room to the right of the kitchen. He noticed that all the outlets and the appliances were connected to only one electric circuit, in violation of Suffolk County Electrical Code 210-11C. He further stated there should be at least two circuits in the kitchen of every residence. It was plaintiff's expert's opinion that the electric circuit running in the kitchen was overloaded. It was his further opinion that because all the kitchen appliances were connected to the same circuit, it is very likely to have repeated power interruptions.

Plaintiff's expert states he tested all the outlets in the kitchen and the outlets in the adjacent rooms with a plug in light bulb and found all the outlets were working and all were grounded. However, he states, that does not mean that all the wiring behind the outlet plates was properly secured to each of the outlets, nor does it mean that the wiring was in good condition. He further states that since this is a two family residence, an additional strain is placed on the existing electrical supply inside the residence causing a repetitive "power tripping" problem and electrical hazard.

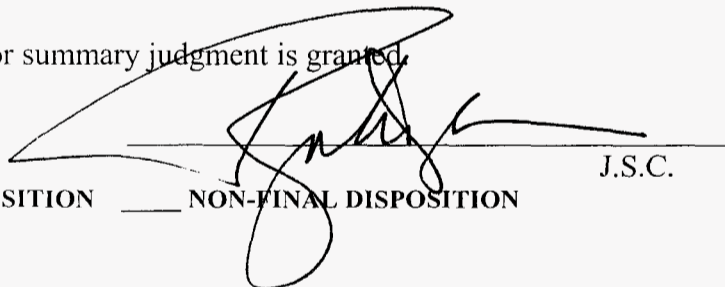
¹The Order of November 14, 2003 (Dunn, J.) provides in pertinent part that this application for pre-action discovery to inspect the electrical circuit breaker including the electrical outlets and electrical circuits throughout the premises located at 11 Woodchuck Lane, East Setauket, New York, considered under CPLR 3120(c) is granted. The order further provides that respondent shall permit an expert to examine the circuit breaker, the electrical outlets, and the individual circuits in the kitchen and all of the rooms that abut the kitchen.

Mr. Sasz states that since he was not permitted to inspect the wiring behind the walls, he can only give an opinion that a loose or frayed wire or wires on one overloaded circuit in the kitchen, and possibly the room above the kitchen, is the most likely cause of a temporary power outage or tripping of the circuit breaker leading to Mr. Jones' accident. He further opined that because there were a large number of power outages affecting just one residence prior to the accident over a three month period, it is extremely unlikely that an outside event caused Mr. Jones' injury.

Mr. Sasz's opinions are based upon speculation and conjecture in that he opines that a loose or frayed wire or wires behind the walls is the most likely cause of a temporary power outage or tripping of the circuit breaker, however he did not find any evidence of the same upon inspection of the outlets or circuit breaker. Although Mr. Sasz stated he was not permitted to inspect the wiring behind the walls as the court order did not permit the same, he can only speculate this is the most likely cause of the power outage or tripping of the circuit breaker. It is noted, however, plaintiff did not seek further order of this court to further inspect the premises or those wires which he speculates could be loose or frayed. Nor does he opine how these wires would have come loose or what is causing them to become frayed behind the protection of the walls. He further opines that since there were a large number of power outages affecting just one residence prior to the accident over a three month period, that it unlikely that an outside event caused Mr. Jones' injury. However, he does not state his basis for this opinion, whether he spoke to other homeowners in the neighborhood who advised him there were no power outages, or what constitutes a power outage. An expert may not reach a conclusion by assuming material facts not support by the evidence, and may not guess or speculate in drawing a conclusion (*Interstate Cigar Co., Inc. V Dynaire Corp.*, 176 AD2d 699, 574 NYS2d 789 [2nd Dept 1991]). Where an expert states his conclusion unencumbered by any trace of facts or data, his opinion should be given no probative force (see, *Amatulli v Delhi Construction Corporation*, 77 NY2d 525, 569 NYS2d 337 [1991]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Billordo v E.P. Realty Associates* 300 AD2d 523, 752 NYS2d 556 [2nd Dept 2002]). Here, plaintiff's expert's report and affidavit were insufficient to raise triable issue as to defendant's alleged negligence since expert's conclusions were unsupported by facts and were solely dependant on his personal opinion (see, *Gerber Trade Finance, Inc. v Skwiersky, Alpert & Bressler, LLP*, 12 AD2d 286, 786 NYS2d 9 [1st Dept 2004]). Based upon the foregoing, it is determined plaintiff's expert's report is conclusory and speculative at best and has fails to raise a triable issue of fact to preclude summary judgment.

Accordingly, defendant's motion for summary judgment is granted.

Dated: SEP 13 2007


 _____ J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION