

Greenberg v Fairwood Assoc.

2007 NY Slip Op 33424(U)

October 10, 2007

Supreme Court, Suffolk County

Docket Number: 0019132/2005

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6/26/07
ADJ. DATE 8/28/07
Mot. Seq. # 001 - MG; CASEDISP

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ROSALIND GREENBERG,	:	LITE & RUSSELL	
	:	Attorneys for Plaintiff	
Plaintiff,	:	212 Higbie Lane	
	:	West Islip, New York 11795	
- against -	:		
	:	CHESNEY & MURPHY, LLP	
FAIRWOOD ASSOCIATES,	:	Attorneys for Defendant	
	:	2305 Grand Avenue	
Defendant.	:	Baldwin, New York 11510	
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Upon the following papers numbered 1 to 27 read on this motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 17 - 23; Replying Affidavits and supporting papers 24 - 27; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint is granted.

This is a motion to recover damages for personal injuries allegedly sustained by plaintiff, Rosalind Greenberg, as the result of a fire in her apartment on January 28, 2005, in Hauppauge, New York. Plaintiff alleges, *inter alia*, that there was a defective condition present in her apartment at the time of the incident, *viz.*, an inoperable smoke detector.

Defendant now moves for summary judgment dismissing the complaint on the basis that it bears no liability for plaintiff's injuries. In support thereof defendant submits, *inter alia*, copies of the pleadings and bill of particulars, affidavit and report by New York State Fire Investigator Eugene J. West, copies of the transcripts of the deposition testimony given by plaintiff and David Ford, as well as the inspection records generated by defendant of the inspections conducted in plaintiff's apartment regarding the smoke detector.

Prior to the incident, at approximately 9:15 a.m., plaintiff testified that she put a pot of soup on her kitchen stove. She brought it to a boil, then reduced it to a medium/high setting. She then “. . . turned [her] back to the refrigerator and was watching Regis...I was watching Regis and Kelly, and all of a [sic] sudden, I feel myself warm.” She continued that as she stood watching television, with her back against the refrigerator, which was approximately ten to twelve inches from the lighted burner, her left arm was at her side, “. . . on the ledge of the refrigerator door,” when she felt warmth on her arm and body. She realized her clothing (pajamas) had caught fire and called to her husband for help. He and neighbors(s) came to her aid. He injured his fingers while assisting her. Subsequently, members of the fire department and ambulance arrived, and both plaintiff and her husband were transported to Stony Brook University Hospital. Plaintiff remained in the hospital for approximately four weeks. She underwent numerous skin grafts and treatment for her injuries.

Plaintiff testified that she did not have a fire extinguisher in her apartment, and the one smoke detector was battery-operated and maintained by the property manager or his staff. She continued that the smoke detector was inspected about twice a year and that the last inspection prior to the incident was within six months. Plaintiff maintains that the smoke detector was in an inoperable condition on the day of the fire and that it was not in compliance with the local fire codes.

Defendant maintains that the premises were in compliance with all applicable fire codes and, in support thereof, relies on the affidavit and incident reconstruction and analysis report of Eugene J. West, wherein the report concludes, even assuming *arguendo* that the smoke detector was inoperable, that the smoke detector was not a factor in causing plaintiff's injuries.

The affidavit of David Ford, Fairwood Property manager, indicates an inspection was performed on the smoke detector in October 2004. (Defendant provided documentation that the premises were inspected on a quarterly basis and provided inspection sheets from April 2003 through March 2005 indicating same.)

A review of the investigative report generated by the Town of Smithtown Department of Public Safety Investigator Brofman, dated January 28, 2005 (which was relied upon, in part, by Eugene West) concludes:

This fire is accidental in nature - - the result of Rosalind Greenberg getting close enough to a nature gas fuel range in the kitchen of the apartment she rents with her husband to allow the clothing to come in direct contact with the open flame on the front left burner of the stove top
. . . no obvious violations were noted in the fire apartment.

Additionally, the report generated by Detective Ruddick of the Suffolk County Police Department similarly indicates that:

There was no evidence found which would contradict the conclusion that the fire was caused by the contact of the victim's clothing with the open nature gas flame on the stove. Therefore, this incident is marked as an accidental fire investigation and closed as non-criminal.

Mr. West indicated that:

The location of the apartment 1H smoke detector was in compliance with all applicable fire codes and regulations.

He continued that:

While there is no evidence that the Apt.1H smoke detector failed to operate during this fire incident, it is my opinion that the activation or non-activation of said smoke detector has no relevance to the injuries sustained by Rosalind Greenberg. Smoke detectors cannot prevent a fire. The purpose of a smoke detector is to provide an early warning of fire. Once a fire occurs, the time it requires for a smoke detector to activate will be primarily contingent on the amount of smoke produced by the fire and distance of the smoke detector unit from the location of the fire. Since the burn injuries sustained by Rosalind Greenberg resulted from an almost instantaneous fire event that caused the immediate ignition of her clothing, no earlier warning of the fire was possible. Once her clothing was ignited, injury to her person was a virtual certainty. Therefore once ignition of her clothing occurred, an activation of her apartment smoke detector would simply have no impact on the sequence of events that occurred after that time.

It is well settled that on a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact. If the moving party fails in meeting this burden, summary judgment must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party, who must establish the existence of material issues of fact requiring trial (*see, Romano v St. Vincent's Medical Center*, 178 AD2d 467, 577 NYS2d 311 [1984]). However, mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. Issue finding rather than issue determination is the key (*see, Schulz v Esposito*, 210 Ad 307, 619 NYS2d 774 [1994]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a

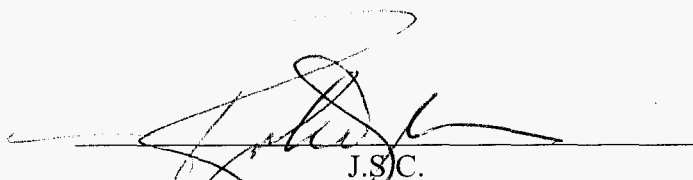
triable issue of fact, or where the material issue of fact is "arguable," summary judgment must be denied (see, *Salino v IPT Trucking*, 203 AD2d 352, 610 NYS2d 77 [1994]).

Defendant has met its initial burden and thus demonstrated its prima facie entitlement to summary judgment as a matter of law by presenting evidence that the smoke detector was in an operable condition at the time of the fire and, assuming arguendo that it was not, that it lacked actual or constructive notice that it was not, and lastly, they provided sufficient evidence from various persons, summarized in the report of Eugene J, West, that even if the detector was not working properly, "...that the burn injuries resulted from an almost instantaneous fire event that caused the immediate ignition of her clothes, no earlier warning of the fire was possible."

Plaintiff failed to offer any testimony or evidence that either she or her husband ever reported to the management, from October 2004 until the day of the incident, that there was a problem with the smoke detector; in fact, she testified that the last time it was inspected, the superintendent told her "... everything was okay." Additionally, plaintiff has failed to demonstrate that the operability of the smoke detector created a question of fact with regard to her injuries.

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

Dated: OCT 10 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION