

Sacca v 41 Bleeker St. Owners Corp.

2007 NY Slip Op 34143(U)

December 19, 2007

Supreme Court, New York County

Docket Number: 0100104/2005

Judge: Jane S. Solomon

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

PRESENT: **JANE S. SOLOMON**

PART 55

Index Number : 100104/2005
SACCA, MASSIMILIANO
vs
41 BLEEKER STREET OWNERS
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/24/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1-3
4-6
7-8

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed Memorandum decision and order.

FILED
DEC 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

N.B. — Pre-trial Conference set for 1/28/08 at 2 PM.

Dated: 12/19/07

JANE S. SOLOMON

J.S.G.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

MASSIMILIANO SACCA,

INDEX NO. 100104/2005

Plaintiffs,

DECISION and ORDER

-against-

41 BLEEKER STREET OWNERS CORP.,

Defendants.

-----X

JANE S. SOLOMON, J.

Plaintiff Massimiliano Sacca (Sacca) claims that he sustained serious personal injuries when a metal window screen fell from above and struck him on the side of the head. He alleges that the screen fell from a building located at 41 Bleeker Street in Manhattan (the Building). The Building has four residential apartments plus a commercial unit, and is owned as a cooperative by 41 Bleeker Street Owners Corp. (Owner). Owner moves for summary judgment dismissing the complaint. Sacca cross-moves for summary judgment as to liability and to compel Owner to produce certain medical records. For the reasons discussed herein, the motion is denied and the cross-motion is granted in part.

Sacca's friend Nadia Olivieri states in her deposition that while she and Sacca were walking on a public sidewalk near a

tree on Bleeker Street in Greenwich Village, she heard the sound of branches scraping against something. Then she saw something moving above her from right to left. She then saw Sacca, who had been walking on her left, lying on the ground injured and bleeding, and a screen was on the ground next to him. The accident occurred in front of the Building. Police and emergency personnel arrived. Police Officer Andrew Bierne testified that the window screen appeared similar to screens on windows in the Building. There is no evidence to show that the screen came from any source but the Building. Sacca received medical treatment in New York, and additional treatment after returning to his native Italy.

Lawrence Moss ("Moss") is an officer of the Owner corporation, and resides on the third floor of the Building. At the time of the accident, neither he nor the second and fourth floor occupants were home. Moss testified that some windows in the building were without screens, and that he did not recall whether there were more screens in place before Sacca's accident. Moss also testified that windows and screens were installed approximately twenty years before the accident, and there had been no maintenance and no inspection by the Building since. He was shown a photograph of the screen that apparently hit Sacca, and testified that it looked similar to screens in the Building,

but smaller than a screen used for one of the Building's larger windows.

Moss produced a copy of a proprietary lease used by Owner. Paragraph 18(a) of the proprietary lease states that the lessees "shall keep the interior of the apartment (including interior walls, floors and ceilings, but excluding windows, window panes, window frames, sashes, sills, entrance and terrace doors, frames and saddles) in good repair . . ." (See Pazer Affirmation, Exhibit 1). Paragraph 2 states that Owner is obligated to keep in good repair all areas of the Building not explicitly excluded in Paragraph 18 (id.). Also, a property owner's general duty to maintain its premises in a safe condition is codified at §§ 27-127 and 27-128 Administrative Code of the City of New York.

Sacca commenced this action in January 2005 and the note of issue was filed on February 5, 2007. Sacca received a significant amount of medical treatment in Italy. However, medical records are not treated in the same fashion in that country as here, and the medical providers are not subject to this court's jurisdiction for the purposes of enforcing a subpoena. The parties' counsel agreed, with the court's participation, to cooperate to obtain and translate medical records from Italy, and to stipulate that the material is

admissible as certified medical records under CPLR Article 45. As a result, Owner obtained Sacca's Italian medical records with his consent and cooperation, and had the material translated. The expense of obtaining the records and translating them was \$4,190.14. Sacca agreed to pay half the cost of obtaining the documents, and to pay half of the translation expense if Owner used the translation; otherwise, he would obtain his own translation and each party would bear its own translation expense.

Owner offered the material to Sacca upon receipt of payment, and Sacca agreed to pay the amount requested. However, Owner subsequently refused to provide the material because its lawyer questioned the accuracy of the translation it had procured. Sacca now moves to enforce the stipulation, and to compel Owner to produce the medical documents and translation.

Discussion

A. Summary Judgment

Owner contends that even if the court accepts as true Sacca's description of the accident, Owner cannot be liable because it had no actual or constructive notice of a defect that resulted in the injury. Also, Owner argues that Sacca cannot proceed with his claim under the doctrine of *res ipse loquitur*

because Owner did not have exclusive control over the windows and screens.

Owner's motion is denied because there is evidence to support the claim that the screen came from its building. The observations of Sacca's companion, Ms. Olivieri, is consistent with his claim that the object that injured him fell in front of the Building, and the police officer's testimony that the screen appeared to be from the Building further supports the claim. Moss's testimony did not rebut the inference that the offending screen came from the Building.

Owner was responsible for maintenance of its screens and windows. Moss's testimony does not make clear how many windows lacked screens before the accident, but implies that some were missing. Owner argues that Sacca cannot establish a breach of a duty to maintain because there is no testimony showing that the offending screen was visibly defective; accordingly, Sacca cannot show actual or constructive notice of a defect. According to Owner, whatever caused the screen to fall could have been a latent defect, and there is no evidence to the contrary.

This argument fails because a jury may reasonably conclude that a property owner, some of whose windows lack screens, is on notice that a problem may exist with respect to how the screens are secured to the windows or their frames. Sacca has established "the existence of facts and conditions from

which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred . . . based upon the logical inferences to be drawn from the evidence" (DeRosa v City of New York, 30 AD3d 323, 325-236 [1st Dept 2006] [citations omitted]).

Sacca cross-moves for summary judgment under the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* applies where a plaintiff shows that the event does not usually occur in the absence of negligence, the instrumentality that caused the event was within the exclusive control of the defendant, and the plaintiff did not contribute to the cause of the accident (Dermatossian v New York City Transit Auth., 67 NY2d 219, 226 [1986]). Summary judgment is rarely granted to a plaintiff upon the doctrine of *res ipsa loquitur*, which operates to permit the finder of fact to infer negligence from the circumstances of the occurrence. It recognizes that we know from our everyday experience that some accidents would not ordinarily happen without negligence (*id.*).

In the present case, there is no dispute that Sacca did not contribute to the cause of the accident. Owner contends that Sacca can not show that it had exclusive control over the exterior screens because Building residents may have interfered. However, Owner is not relieved of responsibility because window screens generally are meant to be adjusted by residents.

Nevertheless, under the sui generis facts here, summary judgment on liability is not appropriate because there are questions of fact regarding Owner's negligence, and, indeed, whether the screen came from the Building at all, as to which a circumstantial evidence charge would be required.

B. Medical Records

Owner maintains that a defendant is not obligated to provide a plaintiff with his own medical records to help him prove his case. Owner's opposition ignores that the stipulation was made willingly by counsel with the court's participation, and was addressed to resolving the technical (and potentially costly and time consuming) problem presented by attempting to obtain medical records through the services of the Italian courts. Therefore, this branch of Sacca's cross-motion is granted, and Owner shall produce the material upon receipt from Sacca of half the cost of obtaining and translating the material.

Owner also argues that it cannot vouch for the accuracy of the translation, so the translation should not be deemed admissible as a medical record. Owner did not produce the records or the translation in connection with these motions, so the request to deem them admissible or not is reserved to the time of trial, upon a motion in limine if appropriate. Accordingly, it hereby is

ORDERED that Owner's motion for summary judgment is denied, and the cross-motion by Sacca is denied to the extent that summary judgment as to liability is denied; and it further is;

ORDERED that the branch of Sacca's cross-motion to compel Owner to produce the Italian medical records and translation is granted, and Owner shall produce that material to Sacca within 10 days of its receipt of \$2,095.07, representing one half the expense of obtaining and translating the records; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on January 28, 2008 at 2 PM, to schedule the date of trial.

Dated: December 19, 2007

ENTER:

FILED
 DEC 24 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

J.S.C.

 J.S.C.
JANE S. SOLOMON