Andrews v New York City Hous. Auth.
2008 NY Slip Op 30797(U)
March 18, 2008
Supreme Court, Kings County
Docket Number: 0021511/2004
Judge: David Schmidt

At an IAS Term, Part SCP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of March, 2008.

PRESENT:

HON. DAVID I. SCHMIDT,

Justice.

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BRENDA ANDREWS, AS ADMINISTRATRIX OF THE ESTATE FOR NATHANIEL ANDREWS, ET AL.,

Plaintiffs,

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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Index No. 21511/04

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
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant New York City Housing Authority (NYCHA, or the Housing Authority) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiffs' complaint.

BACKGROUND

On April 30, 2003, plaintiffs Brenda Andrews and Nathan Andrews, along with their three sons Nathaniel, Nathan Jr., and Jonathan, resided in 1258 Loring Avenue, Apartment 4C, in Brooklyn (the premises, or the apartment). Said premises were owned and maintained by NYCHA. The family had lived there for approximately 17 years. The three boys shared a bedroom, known as "bedroom three".

On April 30, 2003 at approximately 5:30 a.m., a fire occurred in bedroom three. Tragically, Nathaniel perished in the fire, and his two brothers sustained injuries due to smoke inhalation. A Fire and Incident Report subscribed by Fire Marshal Peter Velloza (Velloza) concluded, as to "Origin and Extension", that "[e]xamination showed that the fire originated in the subject premises, inside apartment 4-C. . ., in the north/west bedroom, on the floor, at an area approximately (3) feet from the east wall and (1) foot from the north wall, in combustible material (carpet/bedding). Fire extended to the wall's ceiling and contents therein. The fire further extended to the person of Nathaniel (Byron) Andrews, m/b. The fire further extended, via open void (door) to the hallway ceiling and walls. The fire was thereto confined and extinguished."

Alleging that the fire was proximately caused by NYCHA's negligence, plaintiffs, by summons and verified complaint dated July 7, 2004, commenced the within action, alleging wrongful death and personal injury claims. Issue was duly joined by service of a verified answer dated September 3, 2004. Discovery, including depositions, appears to be complete.

THE TESTIMONY

Several members of the Andrews family testified at statutory 50-H Hearings and at pretrial depositions. In addition, following a protracted period of time that was required in order to locate and produce him, Eli Casenave was deposed on October 30, 2007, subsequent to the date defendant filed the instant motion. Finally, Fire Marshal Velloza testified pursuant to a subpoena.

Brenda Andrews, a/k/a Brenda Durant (Brenda), is married to Nathan Andrews Sr., was the mother of Nathaniel, Nathan Jr.. and Jonathan Andrews, and the grandmother of Eli Casenave (Eli). At her 50H hearing, conducted on September 12, 2002, Brenda testified, with respect to the electrical system in bedroom 3, that there were three outlets therein and that a number of appliances and devices were plugged into them. She further testified that she first became aware of the fire taking place when the smoke alarm sounded.

At her 50H hearing, Brenda testified that on April 25, 2003, Eli told Nathan Jr. that he had observed sparks (or little fires) come out of the socket on the right wall, and that Nathan Jr., in turn, told her of what he had learned. She then instructed Nathan Jr. to call the office and, in her presence, he spoke to the receptionist, who told him that someone would be there. Brenda testified that she herself could see no problem with the socket.

At her deposition on March 20, 2006, Brenda testified that on April 25, 2003, Eli told her that he had just seen sparks coming from an outlet in the bedroom. She further testified that same day she called the management office and spoke to the receptionist, who purportedly put in a requisition, and made another call the following Monday (April 28, 2003), but never received a response.

At the 50H hearing, Nathan Sr. testified that as far as he knew, Nathan Jr. made the call a few days before the fire to the office at Brenda's direction. He indicated that although he was not home when that call was made, he was told that the call was made because Eli had observed the problem. Finally, he stated that although he looked at the outlet, he could see no sign of a problem.

At the 50H hearing held on September 12, 2003, Nathan Jr. (nicknamed "Chippy") testified that he himself observed a spark from the outlet after being told of same by Eli,[1] and instructed Eli to pull the plug from the lamp because he was worried about the carpet catching fire. He further indicated that he unplugged all the devices at night since the carpeting had been installed. He later testified that he never personally observed any sparks emanating from any of the outlets in the apartment. He also stated that he was instructed by his mother to call the Housing Authority's office, and spoke with the receptionist who told him that the people were out to lunch, "and somebody would be there."

At his examination before trial held on March 26, 2006, Nathan Jr. testified that it was his practice to unplug everything at night before going to sleep. He further stated that although he saw no sparking, he learned of it from his nephew Eli, who was approximately 9 years old at the time and who told him "I seen dots". Nathan Jr. instructed Eli to unplug

[1] Nathan Jr. quoted Eli as saying, "Chippy, I see little dots or fire coming out inside the socket."

the light from the outlet, and testified that he then told Brenda about the situation. He stated that he played no role in calling NYCHA's office, but that she directed him to go there to obtain a printout. He testified that he was unable to obtain such a printout because he was advised by the receptionist that "they were at lunch", but that someone would come. Nathan Jr. also testified that approximately a week and a half before the fire, an inspector from NYCHA came to the apartment and indicated that everything was OK.

On November 16, 2006, Michael Davis (Davis), a maintenance worker employed by NYCHA, testified at an examination before trial in this case. He testified that he inspected the Andrews's apartment on April 2, 2003 and filled out a report in connection therewith. He further testified that although certain items, specifically, a door and cabinets, required repair, no problem was observed with respect to any electrical outlets therein.

Examination before trial of Fire Marshal Velloza

At his examination before trial which was held on July 30, 2007, Fire Marshal Velloza testified that he had been employed as a fire marshal for 16 years, had investigated hundreds of fires prior to that at issue here, and was the fire marshal assigned to investigate the fire in the Andrews family's apartment. From documents in his possession, he determined the time of the fire to be 5:40 a.m. on April 30, 2003. He arrived at the apartment at 6:40 a.m. In the bedroom where the fire originated, he observed that the wires leading toward the area of origin were melted together and to the carpeting.

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Velloza testified that in order to determine the area of origin, he was trained to look for the area that was either the most charred, the most damaged, or the lowest burn. Because a fatality was involved, his investigation was delayed until other procedures had been completed.

Referring to his report, Velloza testified that he determined that the fire occurred in an area approximately three feet from the east wall and one foot from the north wall, in combustible material, carpeting, and/or bedding, and noted that the carpeting in the room was burned only at the area of origin. He further stated that his report indicated that numerous electrical cords were found at the area of origin, that an electrical outlet was noted just above said area, that part of the plastic cover over the receptacle was melted, that both portals contained the charred remains of electrical plugs[2], but after removing the receptacle, he determined that hard wires behind the area (in the wall) appeared normal and unaffected by the fire. He therefore determined that the receptacles were not a cause of the fire.

Velloza further testified that he observed numerous wires and extension cords (at least six), leading to the receptacle on the north wall of the bedroom, that there were "quite a few" electrical items in the area, and that the CD tower and a few games were plugged into extension cords in the area identified as the approximate area of origin. Upon questioning, he stated that an overload from a receptacle, caused by something inappropriate plugged in, lightning or a power surge, could cause a fire to emanate from a wall receptacle. He further

[2] Upon questioning, Velloza testified that the electrical plugs referred to were inserted in the outlet, but he was unable to determine where they led to.

stated that sparks emanating from a receptacle could cause a fire, as could resistance heating, which would be caused by excessive resistance in the cord, or something pressing on it. Because of the severe damage to the cords, he was unable to determine which specific one caused the fire, but that the V-burn pattern he observed was "a fairly accurate sign of where the fire originated."

CONTENTIONS

Alleging that the complaint and bills of particulars all state their claims of negligence in generalized boilerplate language, defendant contends that plaintiffs have failed to specifically identify the nature of defendant's negligence. It further contends that the plaintiffs' deposition testimony was inconsistent and should not be considered by the court. In addition, it contends that Eli's testimony merely raises a feigned issue of fact, and that its substance is indistinguishable in its timing and effect from an affidavit expressly drafted to oppose NYCHA's motion. Defendant characterizes the testimony of Eli, who defendant was unable to locate for several years and was only able to depose subsequent to its filing of the instant motion, as "convenient", and that without it, plaintiffs' own testimony as to causation is inadmissible hearsay. Finally, defendant relies on Velloza's testimony to support its position that the fire did not originate in the electrical outlet. and (2) maintains that the affidavit of plaintiff's expert, Gene West (West) should be rejected as speculative and conclusory.

In opposition, plaintiffs rely on Eli's deposition testimony and contend that it is consistent with that of the plaintiffs, cite Brenda Andrews's testimony that she immediately reported the sparking condition to NYCHA, and, in addition to contending that the motion should be denied because their expert reached a different conclusion than did Velloza, argue that Velloza's testimony that he found no conclusive physical evidence that any of the electrical wires were the source of the fire, mandates denial of defendant's motion.

Affidavit of plaintiffs' expert

In his sworn affidavit dated November 1, 2007, West identifies himself as the Vice President of the Guardian Investigation Group and as a nationally-recognized expert consultant in the fields of fire cause and origin, fire protection and safety. He states that he possesses a specific expertise in the investigation of fatal fires and, while assigned to the New York City Fire Department, held the rank of Firefighter, Fire Lieutenant and Fire Marshal. At the time he held the latter position, West states that he was assigned or assisted in the investigation of over 1200 fire incidents. He further represents that as Vice President of Guardian Investigations, he has provided consultation/investigation services for an additional 3,500 fire incidents and fire-related cases, to include incidents that resulted in the deaths of numerous civilians and more than a dozen firefighters.

West states that he reviewed a number of official documents and photographs in connection with this case, personally conducted, on May 12 and June 12, 2003, a physical examination of the premises, and examined items removed from the premises by the NYCHA investigator. He further states that his examination determined that the fire originated in the northwest bedroom of the apartment, in heat from an electrical fault within a duplex outlet located in the bedroom's north wall, that the electrical fault produced a high temperature arc that ignited the mattress and bedding of a bed adjacent to the bedroom's north wall. Flames from the fire then extended to the bedroom north and east walls and therefrom to, and across, the bedroom ceiling. The fire further extended to the entire contents of the bedroom to include the person of Nathaniel Andrews who was present on the top bunk of a bunk bed located diagonally opposite the fire's point of origin.

West further states that Fire Marshal Velloza's investigation concluded that the fire was caused by some type of failure involving an extension cord in the northwest bedroom, but that he does not identify the nature of such failure, and that his review of Velloza's investigative report disclosed a single reference in which "numerous electrical cords were found in the area of origin." He asserts that Velloza's opinion regarding the cause of the fire is based primarily on his observation that these electrical cords were present in the area of fire origin, but that he was unable to differentiate between extension cords and appliance cords in the commingled remnants of those cords and fails to identify the specific cord he claims caused the fire. He claims that Velloza "admits" that the melted wires in the area of fire origin was limited to the wiring insulation and resulted from an external exposure to heat from the fire, not an internal failure, and states that his own review of the fire scene photographs failed to show any evidence that the melting cord insulation described by him was caused by an internal electrical fault.

Further disputing Fire Marshal Velloza's findings, West asserts that Velloza: (1) "admits" that he did not observe any evidence of "beading" normally associated with an electrical arc caused by a fault within electrical wiring, nor did he find any evidence of crimped electrical wire that may have resulted in a "high resistive heating" condition; (2) "admits" that section of cord wiring in the area of origin were missing and therefore not available for examination; and (3) observed the remnants of two plug in the wall outlet located within the area of fire origin, but was unable to determine if the plugs were originally affixed to an extension cord or appliance cord, or determine to any degree of certainty the number of appliances/fixtures supplied by the cords originally connected to those plugs. Addressing the report of sparks emanating from the outlet, West disputes Velloza's statement that the wires within the outlet showed no evidence of adverse electrical activity by opining that loose connections, improper wiring or receptacle problems that can cause a fire may not be readily evident based upon a cursory post-fire visual observation of the outlet. He asserts that "[o]ften a wiring problem or fault within an outlet and the associated wiring thereof cannot be determined without an examination conducted by a qualified electrical engineer under laboratory conditions [using] specialized equipment and microscopic and radiographic studies," and assails, as incorrect, Velloza's testimony that the New York City Fire

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Department does not hire outside engineers or forensic experts to assist in fire investigations.[3]

West further avers that contrary to Velloza's conclusions, his examination of the outlet box did reveal evidence of heat damage consistent with adverse electrical activity, and that in fact, the original outlet boxes had been improperly removed from the subject bedroom by an investigator who had been hired by defendant, and preserved in ways which violated proper fire scene evidence collection protocols.

West concludes by maintaining that without the ability to identify evidence of an electrical fault in any of the electrical cords in the area of the fire origin, it is not possible to determine to any reasonable degree of fire investigative certainty that the fire was caused by a fault in some unidentified extension cord, nor, without a proper examination of the bedroom wall outlets and receptacles, is it possible for Velloza to eliminate these items as a factor in the cause of this fire. However, based upon his own inspection of the fire scene, review of statements, and other materials, West states, to a reasonable degree of fire investigative certainty, that this fire originated in the northwest bedroom of apartment 4C, in heat from an electrical fault within a duplex outlet located in the bedroom north wall.

In reply, defendant charges plaintiffs with complicity in enabling Eli to avoid examination until after the defendant moved for summary judgment, and contends that as a result, the court should disregard his testimony, and, in any event, asserts that his testimony presents only feigned issues of fact designed to defeat defendant's motion. Noting the

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[3] West states that he himself utilized the services of outside experts during his tenure as a fire marshal.

inconsistent testimony rendered by the various plaintiffs between the 50H hearing and their depositions, defendant assails Eli's testimony as generally supporting the accounts given by the plaintiffs at their depositions, thereby supporting the accounts the plaintiffs chose to present once they had obtained discovery from NYCHA. Calling on the court to reject Eli's testimony as speculative, defendant further argues that even assuming that Eli did in fact see sparks, there is no proof that the same thing happened on the day of the incident to cause the fire.

Similarly, defendant contends, in reply, that West's affidavit is speculative and conclusory, and is thus insufficient to raise an issue of fact. Defendant asserts that West does not state or discuss what methods he employed to determine the cause and origin of the fire, or refer to any testing to support his conclusions. It further notes that he fails to support his statement that the origin of the fire was heat from an electrical fault within a duplex outlet; that although he stated that he conducted a physical examination of the scene on May 12 and June 12, 2003, he does not state what he saw at the scene that led him to his conclusions; that in stating that his examination of the [unidentified] outlet box revealed evidence of heat damage consistent with adverse electrical activity, he does not explain why he considers what he saw to be evidence of adverse electrical activity; that he is silent on the flamability of the carpet; that the foundation for the weight he placed on a report of sparks having been observed appears to be suspect testimony; and that his criticism of Velloza's testimony is not sufficient to defeat defendant's motion for summary judgment.

DISCUSSION

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

It is, of course, well settled that liability cannot be imposed upon a landowner for injuries resulting from a dangerous condition unless a plaintiff can show that the landlord either created the dangerous condition or had actual or constructive notice thereof (*see Indence v 225 Union Avenue Corp.,* 38 AD3d 494 [2007]). "A defendant seeking summary judgment dismissing the complaint based on the lack of notice must establish, prima facie, the absence of notice" (*Goldin v Riker,* 273 AD2d 197, 197 [2000]). Here, although there were admitted inconsistency in the testimony rendered by the plaintiffs, Brenda testified at her deposition that she called the management office twice but never received a response, and

Nathan Jr. testified that he went to the office to obtain a printout, but was unable to procure same because the staff was at lunch. Nevertheless, in moving for summary judgment, defendant presented no evidence regarding its lack of actual notice, relying instead on said inconsistent testimony as presented by plaintiffs. Such reliance is insufficient for the purpose of defendant meeting its burden on the issue of actual notice (*see Riley v ISS Intern. Service System, Inc.*, 5 AD3d 754, 756 [2004]; *Wright v Rite-Aid of New York, Inc.*, 249 AD2d 931 [1998]); *see also Gladstone v Burger King, Inc.*, 261 AD2d 357, 358 [1999]), and the court thus finds that defendant has failed to demonstrate, prima facie, that it was not placed on notice of the alleged hazardous condition alleged by plaintiffs.

Moreover, there are issues concerning causation that must be determined by the trier of fact. In disputing the opinions set forth by Fire Marshal Velloza and in support of his own opinion, plaintiffs' expert states that he reviewed official documents that were prepared in connection with the subject incident, conducted a physical examination of the premises, and examined items that were removed from the premises by defendant's investigator. In general, a disagreement between experts merely creates a question of credibility to be resolved by the finder of fact (*see Wilson v Woodward Builders, Inc.*, 140 AD2d 957 [1988] [conflicting expert opinions submitted on the motion held to raise questions of fact whether defects in the circuit breakers and panel box manufactured by that defendant caused the fire which destroyed plaintiffs' home]; *see also Stocklas v Auto Solutions of Glenville, Inc.*, 9 AD3d 622 [2004]). Here, despite defendant's contentions to the contrary, West's opinions are soundly based on the record and on personal inspection of the premises as well as of the tangible evidence that was removed and preserved by defendant (*see Estate of Hamzavi ex rel. Farrell v State*, 43 AD3d 1430, 1431 [2007]). Consequently, defendant's reliance on the inapposite holding in *Butler-Francis v New York City Housing Auth.* (38 AD3d 433 [2007]), where the opinions of the experts were rejected as speculative in that they were specifically found to lack any evidentiary underpinnings, is unavailing.

Based upon the foregoing, the court denies defendant's motion.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT