

Gregory v City of New York

2008 NY Slip Op 30852(U)

March 24, 2008

Supreme Court, New York County

Docket Number: 0104139/2003

Judge: Eileen A. Rakower

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

PRESENT: **EILEEN A. RAKOWER**

PART Part 5

J.S.C.
Justice

Index Number : 104139/2003

GREGORY, GARY

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

2, 3, 4, 5

6, 7

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

MAR 26 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 24, 2008


EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
GARY GREGORY and JOYCE GREGORY,

Plaintiff,
- against -

Index No.
104139/03

THE CITY OF NEW YORK, NEIGHBORHOOD
PARTNERSHIP HOUSING DEVELOPMENT FUND
COMPANY, INC., T&M REALTY MANAGEMENT
INC. and PASCAL REALTY MANAGEMENT
CORPORATION,

DECISION
and ORDER

Defendants.

Mot. Seq. 003

FILED
MAR 26 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER:

Firefighter Gary Gregory brings this action for personal injuries he suffered when he tripped on a spackle bucket and fell down stairs while fighting a fire at 50 West 129th Street on October 1, 2001. Joyce Gregory brings a derivative action. The City of New York (City) owned the building and leased it to Neighborhood Partnership Housing Development Fund Company, Inc. (NPHDFC) and T&M Realty Management, Inc.(T&M). Plaintiffs allege that a spackle bucket was negligently left in the hallway and the severity of the fire and the associated smoke condition were exacerbated by defendants' violation of various sections of the administrative code, including an unsealed dumbwaiter shaft, which directly or indirectly caused his injury. (General Municipal Law §205-a.) An investigation revealed that the fire started in a fifth floor apartment, in a clothes dryer which tenants are not permitted to have, and spread up the open dumbwaiter shaft that the tenant was using to vent the dryer.

Plaintiffs brings this motion to re-argue the court's decision dated September 26, 2007, now seeking reinstatement of plaintiff's common law negligence cause of action against NPHDFC and T&M. City cross moves to reargue denial of its motion for summary judgment on the issue of contractual indemnity from NPHDFC and T&M, and now seeks for the first time summary judgment dismissing plaintiffs' causes of action pursuant to General Municipal Law(GML) § 205-a pursuant to the firefighter's rule along with dismissal of plaintiff Joyce Gregory's cause of action

under GML § 205-a. NPHDFC and T&M also cross move to reargue their motion for summary judgment and seek dismissal of plaintiff's cause of action against Pascal Realty Management Corporation (Pascal) which was discussed in the court's October, 2007 decision but not expressly passed upon. Plaintiffs oppose City's, NPHDFC's and T&M's cross motions except for that portion that pertains to Pascal. City opposes plaintiffs' motion to reargue and NPHDFC's and T&M's cross motion except for that portion that pertains to Pascal. NPHDFC and T&M oppose plaintiff's and City's motions. The motions to re-argue are granted.

Although not "ordered" in the decretal paragraphs, the court's September, 2007 decision stated, "[i]nitially, plaintiff is precluded from bringing claims of common law negligence by the "firefighter's rule," which states

Where some act taken in furtherance of a specific police or firefighter function exposes the plaintiff to a heightened risk of sustaining the particular injury, he or she may not recover damages for common law negligence. (*Zanghi v. Niagara Frontier Transp. Comm'n*, 85 NY2d 423[1995]).

Plaintiffs argue here that the prohibition of a common law cause of action for negligence was abrogated by General Obligations Law § 11-106 in 1996, except as to fellow firefighters and municipal employees. Plaintiffs concede that such a cause of action may not be sustained against City.

General Obligations Law § 11-106 states that

Whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease, or death is proximately cause by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee, the police officer or firefighter suffering that injury . . . may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury, disease or death.

Accordingly, General Obligations Law § 11-106 permits firefighters a cause of action where they are injured by the negligence of another who is not his employer

or co-worker, (*Grogan v. City of New York, et al.*, 259 AD2d 240 [1st Dept. 1999]) and plaintiff may maintain a common law cause of action for negligence against NPHDFC and T&M.

NPHDFC and T&M reargue that they are entitled to summary judgment because there is no evidence in the record demonstrating that they had notice of either the bucket in the hallway or any administrative code violation regarding the unsealed dumbwaiter. NPHDFC and T&M state that City is responsible for any violations pertaining to the dumbwaiter because NPHDFC and T&M only controlled the building for nineteen days prior to plaintiff's injury and it was not possible to discover and remedy any such defect in that time period.

The deposition testimony of the building superintendent, Mr. Rosado (Rosado) reveals that the President of the Tenants Association would sometimes hire her husband, Mr. Fredericks (Fredericks,) to do repairs in the building. There is evidence that a report regarding the presence of lead paint may have prompted T&M to make repairs and, at the time of the fire, Fredericks was painting some of the apartments. Rosado kept supplies in the basement, including five gallon spackling buckets, both full and empty, for repairs such as plastering holes. Rosado loaned Fredericks certain painting supplies but does not recall lending him a spackling bucket. Rosado testified that the only work being done in the building at that time was in the apartments "repairing walls, painting, that would be it." Rosado also testified that at times there was garbage in the hallways which he would clean up and remove. This evidence is sufficient to create a question of fact for the jury regarding the bucket in the hallway that plaintiff tripped on.

NPHDFC and T&M also argue that they are entitled to summary judgment because they did not have notice of any administrative code violations in the building and nineteen days is insufficient, as a matter of law, to discover and cure any such violations. They argue that the facts here require liability for these violations to extend to City. City opposes NPHDFC and T&M's motion for summary judgment and seeks contractual indemnification. City argues that the lease between it and NPHDFC and T&M requires them to inspect the building and to maintain it in a safe condition. City states that it should be held blameless for any GBL § 205-a violation for which NPHDFC and T&M may be liable.

Relevant portions of the lease between City and NPHDFC and T&M state

Article III, 3.1 Management. Lessee shall operate and manage the Premises as hereinafter described.

Article III, 3.2 Repairs and Maintenance. Lessee shall regularly visit and inspect the Premises; cause the Premises to be maintained and operated in a proper, safe, and sanitary condition in compliance with all applicable laws and regulations; and make or cause to be made all repairs, replacements, and adjustments to the Premises and all fixtures, equipment, and appurtenances.

Article V, 5.1 Existing Tenants. Lessee accepts the Premises subject to the rights of all lawful tenants and persons with rights to occupy the Premises. Lessor makes no representation or warranty to Lessee regarding the occupancy of the Premises and lessee has inspected the Premises and shall be charged with knowledge thereof.

Article VII, 7.1 Indemnity. If the person or property of others sustains any loss, damage or injury resulting from the negligence, carelessness or willful tort of Lessee, its agents, employees, contractors, or subcontractors in the performance of this Net Lease or from its or their failure to comply with any provisions of this Net Lease or of applicable laws, Lessee shall indemnify and hold Lessor harmless from any and all claims and judgments and from any costs and expenses which Lessor may suffer or incur by reason thereof. This Section 7.1 shall survive termination or expiration of this Net Lease.

City argues that NPHDFC and T&M expressly assumed liability in accordance with Article VII, 7.1, the indemnification clause. It argues that under Article V, 5.1, NPHDFC and T&M acknowledged that they had inspected the premises. This provision relates to tenant occupancy but nonetheless verifies that an inspection of the apartments was done. Additionally, NPHDFC and T&M were required by Article III, 3.2 to "visit and inspect the Premises; cause the Premises to be maintained and operated in a proper, safe, and sanitary condition in compliance with all applicable laws and regulations . . ." Further, there is evidence that a manager from T&M, Mr. Pascal, along with another unknown person, did inspect the premises.

Liability for a dangerous condition does not extend to a prior owner but a “narrow exception exists, however, and liability may be imposed where the condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known.” (*Bittrolloff v. Ho’s Development Corp., et al.*, 77 NY2d 896 [1991]). NPHDFC and T&M argue that nineteen days, as a matter of law, is not sufficient time for it to have discovered and remedied the violation. However, a review of the cases on the subject reveals that Appellate Courts focus less on the intervening time period than whether the violation or defect was readily apparent or hidden and undiscoverable. (See, *Gramazio v. 370 Lexington Avenue, LLC, et al. and the City of New York*, 40 AD3d 303 [1st Dept. 2007], holding that an issue of fact exists as to whether the oil fill cap that was embedded in and beneath the sidewalk was latent and undiscoverable during the two days that defendant 370 Lexington Avenue LLC had owned the building; *Bittrolloff v. Ho’s Development Corp., et al., supra*, City not liable for fireman’s injury where Ho’s Development Corp. was in possession of the building for nine months and City had not retained the right or obligation to remedy dangerous conditions; *Matthews v. Tobias*, 260 AD2d 608 [2nd Dept. 1999] holding that present owner who was in possession for thirty four days when plaintiff moved into apartment with lead paint condition could not extend liability to prior owner where there is no evidence that prior owner either created or concealed condition from present owner; *Cf. Farragher, v. City of New York*, 26 AD2d 494 [1st Dept. 1966], liability extends back to City where injury occurred four months into new ownership and violation for lack of sprinkler system, although revealed to new owner, would take six months to remedy). City also argues that NPHDFC and T&M’s witness admitted at deposition that the condition of the dumbwaiter shafts was not hidden, however, City does not submit that deposition here.

City also maintains that NPHDFC and T&M’s argument that plaintiff cannot recover from them under GML § 205-a because they did not have notice of the administrative code violations pertaining to the dumbwaiter is without merit. In fact,

[N]otice is material to recovery under General Municipal Law § 205-a. However, to be sufficient under the statute, it is not necessary that the plaintiff provide such notice as he would be required to demonstrate in order to recover under a theory of common law negligence, viz., actual or constructive notice of the particular defect

[* 7]

on the premises causing injury. The statute requires only that the circumstances surrounding the violation of 'some statute, ordinance, or rule respecting the maintenance and safety of such premises' indicate that the violation was, in the words of the statute, 'a result of any neglect, omission, willful or culpable negligence' on the defendant's part." (*Lusenskas v. Axelrod*, 183 AD2d 244 [1st Dept. 1992] internal citations omitted).

The untimely demise of T&M's manager who inspected the premises and its inability to identify its other employee who accompanied him on the inspection tour does not serve to relieve its obligation to "inspect the Premises; cause the Premises to be maintained and operated in a proper, safe, and sanitary condition in compliance with all applicable laws and regulations," nor does it shift liability and release them from their duty to indemnify City. Here, as in *Bittrolff, supra*, neither plaintiff nor NPHDFC and T&M has offered anything to show that the alleged defective conditions existed before City leased the premises to NPHDFC and T&M. Additionally, neither plaintiff nor NPHDFC and T&M demonstrate that NPHDFC and T&M did not have adequate time to discover and remedy such defects. (*Id.*) Accordingly, City is entitled to contractual indemnification from NPHDFC and T&M.

City also argues for the first time that it is entitled to summary judgment as against plaintiffs and that plaintiff Joyce Gregory cannot recover in a derivative action based upon violations of GML §205-a. As these motions are untimely, the court will not address them. (CPLR § 3212).

Lastly, defendants NPHDFC and T&M renew their request to discontinue as against defendant Pascal Management Corporation (Pascal). These defendants and plaintiff signed a stipulation of discontinuance as to Pascal on January 26, 2007, a copy of which is annexed here. The court noted in its September, 2007 decision that City did not consent to discontinuance as to Pascal but "made no mention of Pascal in its answer, nor in its motion for summary judgment." NPHDFC and T&M now also append a notarized affidavit from T&M's manager stating that Pascal "did not own lease, operate, maintain, possess, repair control and/or manage the premises" on before or after the date of plaintiff's accident. In its cross-motion here for summary judgment and contractual indemnification, City again makes no reference to Pascal and does not oppose discontinuance as to it. Accordingly, the action shall be discontinued as to Pascal. Wherefore, it is hereby

ORDERED that the motions to re-argue are granted; and it is further

ORDERED that plaintiff's motion to reinstate a cause of action for common law negligence as to NPHDFC and T&M is granted; and it is further

ORDERED that NPHDFC and T&M's motions for summary judgment as against plaintiff are denied; and it is further

ORDERED that NPHDFC and T&M's motions for summary judgment as against City are denied; and it is further

ORDERED that City's motion for summary judgment as against plaintiffs is denied as untimely; and it is further

ORDERED that City's motion for summary judgment in the derivative action of plaintiff Joyce Gregory pursuant to GML§ 205-a is denied as untimely; and it is further

ORDERED that, upon re-argument, City's motion for summary judgment on the issue of contractual indemnification as against NPHDFC and T&M is granted; and it is further

ORDERED that this action is dismissed as to defendant Pascal Management Corporation; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

All other relief requested is denied.

This constitutes the decision and order of the court.

Dated: March 24, 2008


EILEEN A. RAKOWER, J.S.C.

FILED
MAR 26 2008
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