

Marks v Tanski

2008 NY Slip Op 33336(U)

December 15, 2008

Supreme Court, Albany County

Docket Number: 8574-07

Judge: Joseph C. Teresi

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT
ROBERT MARKS,

COUNTY OF ALBANY

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 8574-07
RJI NO. 01-08-092004

BRUCE TANSKI, individually and
d/b/a PINE RIDGE II APARTMENTS,

Defendants.

Supreme Court Albany County All Purpose Term, December 8, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

John A. Della Ratta, Esq
Attorney for Plaintiff
147 Barrett Street
Schenectady, New York 12305

Burke, Scolamiero, Mortati & Hurd, LLP
Thomas J. Reilly, Esq.
Attorneys for Defendants
302 Washington Avenue Extension
PO Box 15085
Albany, New York 12212

TERESI, J.:

On January 1, 2005, as plaintiff left his daughter's second floor apartment, he fell down the flight of stairs that led up to it. Plaintiff commenced this action seeking damages for the personal injuries he sustained. Issue was joined and discovery is complete. Plaintiff now moves to amend the caption of the action, to include the entity that owns the apartment complex where he fell. Defendants oppose the amendment, and cross move for summary judgment. Plaintiff opposes the motion. Because plaintiff failed to make the requisite showing for an amendment of his pleadings, his motion is denied; and, because defendants demonstrated their entitlement to

judgment as a matter of law, summary judgment is granted dismissing plaintiff's complaint.

Plaintiff's motion, purportedly to amend the "caption of the action", actually seeks to amend the complaint. Plaintiff's initial complaint alleges the named defendants owned the apartment complex where plaintiff sustained his injury. Plaintiff subsequently learned that the apartment complex is owned by Clifton Court Apartments, LLC, who owned it for more than one and one half years prior to plaintiff's fall. Plaintiff's argument seeking only to amended the caption would wholly fail to plead Clifton Court Apartments, LLC's ownership of the apartment complex, if only the caption and not the complaint itself were amended. Moreover, the plaintiff attaches an amended complaint to his moving papers, proposing to modify the substantive allegations of ownership of the apartment complex. As such, plaintiff's motion will be considered as one seeking to amend the complaint.

"It is well settled that provided that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, leave to amend pleadings under CPLR 3025(b) should be freely granted" (Ciarelli v. Lynch, 46 A.D.3d 1039 [3d Dept. 2007])[quoting Smith v. Haggerty, 16 A.D.3d 967 [3d Dept. 2005][internal quotations omitted]). However, "[w]hile delay alone is insufficient to deny a motion to amend, when unexcused lateness is coupled with prejudice to the opposing party, denial of the motion is justified" (Pagan v. Quinn, 51 AD3d 1299, 1300-01 [3d Dept. 2008]).

Here, plaintiff's amendment lacks merit. Although, the amendment would properly name Clifton Court Apartments, LLC as the owner of the premises where plaintiff's fall occurred, the statute of limitations bars this action against Clifton Court Apartments, LLC.

Defendants demonstrated that the plaintiff's alleged incident occurred more than three

years prior to Clifton Court Apartments, LLC being brought into this action, which exceeds its limitations period. (CPLR §214). As the defendants demonstrated that the limitations period expired for purposes of bringing suit against Clifton Court Apartments, LLC, “the burden is on the plaintiff to establish the applicability of the relation back doctrine.” (Spaulding v. Mt. Vernon Hosp., 283 AD2d 634 [2d Dept. 2001]). The relation back doctrine allows for the addition of a party against whom the limitations period has run, into a timely commenced action, upon the plaintiff demonstrating each element of a three part test. First, “both claims must arise out of the same occurrence, [second] defendant and [Clifton Court Apartments, LLC] were united in interest, and by reason of that relationship can be charged with notice of the institution of the action such that it will not be prejudiced in maintaining a defense on the merits, and [third] defendant knew or should have known that, but for a mistake by plaintiff as to the identity of the proper party, the action would have been brought against it as well.” (Mongardi v. BJ’s Wholesale Club, 45 AD3d 1149 [3d Dept. 2007][quoting Buran v. Coupal, 87 NY2d 173 [1995]]).

On this record, only two of the three necessary elements of the relation back test are demonstrated. The first element is clearly shown in that the claims arise from the same occurrence in both the current and proposed complaints. Likewise, the third element has been met. Defendant Tanski, the sole member of the Clifton Court Apartments, LLC, clearly knew of plaintiff’s complaint which is wholly based upon a theory of landowner liability. He also knew that the plaintiff’s fall occurred at premises owned by Clifton Court Apartments, LLC. From such established facts, defendant Tanski knew or should have known that Clifton Court Apartments, LLC should have been named as a defendant in this action, but for the mistake of

plaintiff.

Plaintiff, however, failed to demonstrate the second, “unity of interest”, element. “Unity of interest is demonstrated when the interest of the parties in the subject-matter is such that they [will] stand or fall together and that judgment against one will similarly affect the other... this prong is more than a notice provision... and requires a showing that the new and original defendants are vicariously liable for the acts of the other.” (Mongardi, supra at 1150-51; Zehnick v. Meadowbrook II Associates, 20 AD3d 793 [3d Dept. 2005]). Here, plaintiff has wholly failed to demonstrate that either named defendant is “vicariously liable” for the acts of Clifton Court Apartments, LLC, or vice versa. Plaintiff’s reliance upon the unsupported deposition testimony of individuals who work at the apartment complex herein, who stated that Pine Ridge II Apartments and Clifton Court Apartments, LLC were “essentially” the same, fails to establish the necessary legal relationship required of the “unity of interest” test. Defendant Tanski’s status as the sole member of Clifton Court Apartments, LLC does not compel a different result, because defendant Tanski is not “vicariously liable” for the tort liability of the company. LLCL §609(a).

Additionally, plaintiff’s delay in seeking this amendment is substantial and plaintiff offers no excuse to explain it. The proposed amendment comes almost four years after the plaintiff sustained his injury herein, more than one year since the commencement of this action, after all discovery is complete and less than three months from the date set for the commencement of this trial. Plaintiff offers no excuse to explain such delay. The inability to conduct further discovery alone constitutes substantial prejudice to defendants. Prejudice coupled with the unexcused delay, and the amendment’s lack of merit, requires denial of plaintiff’s motion to amend.

Turning next to defendants' motion, "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). All evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 AD3d 835 [3d Dept. 2005]; Crosland v. New York City Transit Auth., 68 NY2d 165 [1986]).

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). The motion must be supported by a "person having knowledge of the facts" or other "admissible proof". (CPLR §3212(b) and Alvarez v. Prospect Hospital, supra).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Id. at 562).

First the defendants seek summary judgment due to their non-ownership of the premises where plaintiff sustained his injury. "[L]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property." (Battaglia v. Town of Bethlehem, 46 AD3d 1151, 1154 [3d Dept. 2007])[quoting Turrisi v. Pondersoa, Inc., 179 AD2d 956, 957 [3d Dept.

1999]). “The presence of one or more of the foregoing elements is sufficient to give rise to a duty to exercise reasonable care.” (Arsenault v. Regan Trust, 263 AD2d 754 [3d Dept. 1999]).

Defendants have demonstrated, as a matter of law, that they do not own the property where plaintiff’s fall occurred. Defendants submitted a certified copy of the deed to the property, and plaintiff raised no issue of fact relative to ownership.

However, defendants failed to demonstrate, as a matter of law, that they did not “control” the premises. Defendant Tanski submitted no affidavit disavowing “control” of the premises. Likewise, his deposition testimony failed to affirmatively demonstrate that neither he, nor his doing business as entity, exert control over the premises. His deposition testimony was vague and inconclusive as to the employer of the staff who manage the premises. The affidavit of Ms. Aegsen, which alleges her own employment as the office manager for Clifton Court Apartments, fails to cure such defect. Such affidavit is directly contradicted by her deposition testimony, in which she stated that she was employed by defendant Tanski. Also, noteworthy is the fact that Ms. Aegsen’s affidavit alleges employment by “Clifton Court Apartments” and not by Clifton Court Apartments, LLC. On this record, defendants have failed to demonstrate their entitlement to summary judgment due to their non-ownership of the premises, because they failed to demonstrate, as a matter of law, that they did not control the premises.

Defendants alternatively seek summary judgment on the theory that they “maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition.” (Candelario v. Watervliet Housing Authority, 46 AD3d 1073, 1074 [3d Dept. 2007]).

Defendants demonstrated that they had no actual notice of a defective condition.

Defendants submitted the office manager's affidavit, which established that all maintenance complaints were, as a strict policy, written up and no complaint was made relative to the area of plaintiff's fall. Defendants supported such allegations by submitting all maintenance request documents, relative to the building where plaintiff fell for the two year period surrounding plaintiff's fall. The deposition testimony of both the office manager and the manager of the maintenance staff for the premises also demonstrated that no actual notice was received.

Defendants also demonstrated their entitlement to judgment as a matter of law on the "constructive notice" issue. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant... to discover and remedy it." (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]). Defendants demonstrated, as a matter of law, the absence of "constructive notice" by introducing the deposition testimony of plaintiff. Plaintiff testified at his deposition that he saw no ice in the area of his fall when entering his daughters apartment, nor upon leaving. Such testimony demonstrates that the defective condition claimed ("ice that had accumulated just outside his daughter's door") did not exist for a "sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (Boucher v. Watervliet Shores Associates, 24 AD3d 855, 856 [3d Dept. 2005]). As such, defendants demonstrated as a matter of law that they did not have constructive notice of the defective condition.

Again the deposition testimony of both the office manager and the maintenance staff manager, along with the deposition testimony of defendant Tanski, demonstrated that defendants "maintained the premises in a reasonably safe condition". Their testimony demonstrated that defendants would respond to all non-emergency complaints within 48 hours and responded to

emergency complaints immediately. Also, each time a maintenance staff member addressed a complaint, they inspected that building's common areas. The record demonstrates that plaintiff's fall occurred at the top of a flight of carpeted stairs, where a handrail was properly attached. From the foregoing, defendants demonstrated that they maintained the area of plaintiff's fall in a reasonably safe manner.

Plaintiff, in opposition, fails to raise an issue of fact which requires a trial. Plaintiff puts great emphasis on his claim that the exterior door, leading to the common stairway where he fell, had a screen window rather than a glass window. Plaintiff claims that the screen window allowed the ice accumulation that caused plaintiff's fall. Plaintiff fails to show, however, how the outdoor conditions allowed in by the screen window on the ground floor, could cause an ice accumulation at the top of a flight of carpeted stairs on the second floor. Moreover, plaintiff's own deposition testimony specifically contradicts his claim that ice had accumulated where he fell. He specifically stated that he saw no ice at the top of the stairs in front of his daughter's apartment door. Plaintiff raised no material issue of fact on this motion.


Accordingly, plaintiff's motion to amend the caption of this action is denied and defendants' motion for summary judgment is granted.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR

§ 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 15, 2008
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 29, 2008, Attorney Affirmation of John Della Ratta, dated September 29, 2008, with Exhibits "A" - "E";
2. Notice of Cross Motion for Summary Judgment, dated November 3, 2008, Affirmation of Thomas Reilly, dated November 3, 2008, with attached Exhibits "A" - "L"; Affidavit of Alana Aegsen, dated November 3, 2008, with attached Exhibit "A";
3. Reply Affirmation in Support of Motion to Amend Caption and in Opposition to Cross Motion of John Della Ratta, dated December 1, 2008, with Exhibits "A" - "E";
4. Reply Affirmation of Thomas Reilly, dated December 4, 2008.