

Martin v Olnick Org.

2008 NY Slip Op 33448(U)

December 3, 2008

Supreme Court, New York County

Docket Number: 106742/05

Judge: Doris Ling-Cohan

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

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

Martin

INDEX NO.

106742/05

MOTION DATE

- v -

Olrik Organization et al.

MOTION SEQ. NO.

003

MOTION CAL. NO.

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

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by defendants for summary judgment is denied in accordance with the attached memorandum decision,*

(consolidated for disposition with motion seq. # 004.)

FILED

DEC 26 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/30/08

JUSTICE DORIS LING-COHAN *v.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: I.A.S. PART 36

Motion Seq. 003/004

-----X
WEDNESDAY MARTIN,

Plaintiff,

Index No.
106742/05

-against-

THE OLNICK ORGANIZATION, INC. and
BRISTOL PLAZA HOTEL,

Defendants.

-----X
THE OLNICK ORGANIZATION,

Third-Party Plaintiff,

Index No.
590976/05

-against-

P.A.C. Exterminating Co.,

Third-Party Defendant.

-----X
DORIS LING-COHAN, J.:

Motion Sequence Nos. 003 and 004 are consolidated for disposition. In Motion Sequence No. 003, defendants The Olnick Organization, Inc. (Olnick) and Bristol Plaza Hotel (Bristol Plaza) move for summary judgment dismissing the complaint against them. In Motion Sequence No. 004, third-party defendant P.A.C. Exterminating Co. (PAC) moves for summary judgment dismissing the complaint, the third-party complaint and plaintiff's cause of action for punitive damages.

The instant action seeks damages for personal injuries allegedly caused by bedbug bites during plaintiff's stay in a

condominium unit (the Unit) located at 210 East 65th Street, New York, New York (the Subject Premises) from September 15, 2004 through December 2004. Plaintiff brought this negligence action against Bristol Plaza and Olnick, as the operators and owners of the luxury extended stay hotel at the Subject Premises. Defendants thereafter commenced a third-party action against PAC, the company that performed exterminating services at the Subject Premises. Plaintiff then asserted a cross claim for negligence against PAC.

Defendants now seek summary judgment dismissing the complaint. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

In support of their motion, defendants argue that they could not be held liable for plaintiff's injuries caused by an alleged begbug infestation in the Unit because they did not own

the Unit and, accordingly, did not owe plaintiff a duty of care. Further, they argue that they did not create or have notice of the alleged condition.

With respect to its initial argument - that defendants did not owe plaintiff a duty of care - Andrew Berkman, a member of the Board of Managers of the condominium association known as 200 East 65th Street and 210 East 65th Street Condominium Association (the Condo Association) asserts that the Condo Association's records reflect that the fee owner of the Unit at the time of plaintiff's alleged injuries was Milro Associates; that the Condo Association controls the common elements of the condominium building located at 200 and 210 (2 different towers) East 65th Street, New York, New York; and that the Subject Premises is known as "'Bristol Plaza', a name given to [it] by the Fifteenth Amendment to [the] condominium offering plan" (Berkman Aff. ¶¶ 3-5).

In her opposition papers, plaintiff does not dispute that the Unit was owned by Milro Associates. However, plaintiff maintains that Bristol Plaza was a full service luxury hotel facility; that she and her family dealt with the Bristol Plaza's representative on their short term stays at the Hotel on all issues, including her bedbug complaint; that the leases that were

signed in connection with their stays were emblazoned with the bold lettering, "Bristol Plaza Hotel;" and that Bristol Plaza provided them with daily services, including change of linen, cleaning of the bathroom and kitchen, and extermination services (Martin Aff. ¶¶ 4-7, 9).

"To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (Solomon v City of New York, 66 NY2d 1026, 1027 [1985]). Here, the record demonstrates that the Unit was owned by Milro Associates (Defs.' Exh. H, Lease for Unit dated 7/21/04). It is further acknowledged by the Condo Association that Bristol Plaza controls the common elements of the Subject Premises (see Defs.' Exhs. F & G, Declaration of Condominium and Fifteenth Amendment to Condominium Offering Plan, respectively). As argued by defendants, a proprietary interest in the common elements of the Subject Premises is generally insufficient to impose liability on them for alleged injuries sustained in a portion of the Subject Premises not owned by them (see Aarons v 401 Hotel, L.P., 12 AD3d 293, 293-94 [1st Dept 2004]).

Here, however, pursuant to the Fifteenth Amendment to the Condominium Offering Plan, Bristol Plaza provides daily maid

services to the furnished residential condominium units at the Subject Premises (Defs.' Exh. G at 1). Hilary J. James (James), Bristol Plaza's general manager, testified, during her deposition, that one half of the Subject Premises was turned into a hotel, and that her responsibilities as general manager include operating the hotel and taking care of infestation and pest control issues (Defs.' Exh. K, Deposition of Hilary James taken on 10/19/06, at 7-12, 17-18).

"While it is true that a hotelkeeper is not an insurer of the guests' personal safety, at common law the hotelkeeper has a duty to exercise reasonable care for the guests' safety" (Taieb v Hilton Hotels Corp., 131 AD2d 257, 260 [1st Dept 1987]). "The duty to safeguard hotel guests from known danger persists even if the danger arose through no fault attributable to the hotelkeeper" (id. at 260). Thus, contrary to defendants' argument, as the operator of the hotel, Bristol Plaza owed a duty to plaintiff to maintain the Unit in a reasonably safe condition (id.; see also Jungjohann v Hotel Buffalo, 5 AD2d 496 [4th Dept 1958]).

As for defendant Olnick, Bruce Simon, its president, alleges that it did not owe a duty to plaintiff, since it is not the owner of the Unit, and 'has no management, maintenance,

supervisory, or other role with respect to the [Unit]" (Simon Aff. ¶ 3). In opposition, plaintiff argues that a duty of care arises from Olnick's ownership and operation of the Bristol Plaza. To demonstrate Olnick's involvement in the Bristol Plaza, plaintiff submits pages from Olnick's website, which states that Olnick "owns and operates hotels in Morristown, New Jersey and Manhattan," and listed in these Olnick hotel properties is the Bristol Plaza Hotel (Pl.'s Exh. N, page from www.olnick.com/hotels/bristol).

In reply, Olnick challenges the evidentiary nature of the website printout, stating that plaintiff failed to provide an evidentiary foundation for it, and thus, as hearsay, it is inadmissible evidence to raise a factual issue. In addressing the website's statements, Bruce Simon alleges that Olnick "lends its name to promote various different properties on its website," and reiterates that it does not own the Unit and/or has any management, maintenance, supervisory or other role with respect to the Unit (Simon Reply Aff. ¶¶ 3-4).

Contrary to Olnick's argument, hearsay evidence may be utilized in opposition to a motion for summary judgment provided that it is not the only evidence upon which the opposition to summary judgment is predicated (Narvaez v NYRAC, 290 AD2d 400,

400-01 [1st Dept 2002])). Here, it is clear that the website printout relied on by plaintiff was submitted with no attempt at establishing a foundation for admissibility as evidence, and, thus, is hearsay. Plaintiff's opposition papers, however, also include the deposition of Joel Moser, plaintiff's husband, who testified, inter alia, that subsequent to the discovery of the alleged bedbug infestation, he spoke to Olnick's president about finding them another unit at Bristol Plaza, in addition to speaking to James; that he advised Olnick's president of the bedbug issue; and that he believes he also sent an e-mail to Olnick's president asking about other accommodations (Pl.'s Exh. L, Moser's deposition taken on 1/17/07 at 33, 40). As previously discussed, the owner or operator of the Bristol Plaza owes a duty to plaintiff to maintain the Unit in a reasonably safe condition (Taieb, 131 AD2d at 260). Thus, there are factual issues as to Olnick's involvement, if any, with the services provided to the Unit, including, but not limited to, whether it is an owner and/or operator of the Bristol Plaza.

Defendants also argue that they did not create the alleged bedbug infestation, and that plaintiff cannot impute notice to them of such condition by virtue of a generalized emerging bedbug problem in New York City.

In order to impose liability for negligence on defendants, plaintiff must establish that there was an unsafe condition that the hotel created, or had actual or constructive notice of and a reasonable time to correct or warn about its existence (see Mercer v City of New York, 88 NY2d 955, 956 [1996]). Here, plaintiff does not claim that defendants created the problem but, rather, that they had notice of the bedbug problem in the Subject Premises. While plaintiff seeks to impute notice on defendants as a result of defendants' receipt of information as to the emerging problem of bedbugs in New York City, a mere "general awareness" of a particular condition is insufficient to establish constructive notice (see Piacquadio v Recine Ralty Corp., 84 NY2d 967, 969 [1994]). However, a review of the parties' depositions discloses that there is a factual issue as to whether defendants had notice of the alleged bedbug infestation. James and Jocelyn Hernandez, Bristol Plaza's director of housekeeping, both testified that Bristol Plaza never had a problem with bedbugs prior to plaintiff's complaint (Defs.' Exh. K, James's deposition held on 10/19/06 at 35, 46; Pl.'s Exh. G, Hernandez's deposition held on 3/9/07 at 23-24, respectively). However, William J. Collis, a technician from PAC, which provided regular exterminating services to Bristol Plaza, testified that

he was asked by Bristol Plaza to check for bedbugs on at least five occasions, in addition to the inspection conducted in response to plaintiff's complaint (Collis's deposition held on 1/18/07, at 41-43).¹ Thus, there is a factual issue as to whether defendants had notice of the alleged bedbug infestation.

Accordingly, defendants' motion (sequence no. 003), for summary judgment dismissing the complaint against them is denied.

In motion sequence no. 004, third-party defendant PAC moves for summary judgment, initially arguing that it did not owe a duty of care to plaintiff, a non-contracting third party to the arrangements between it and Bristol Plaza. The threshold issue is the extent, if any, of the duty of care that PAC, as a contractor, owed to plaintiff, a non-contracting party to its contractual arrangements with defendants (see Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 139-40 [2002]). Generally, a contractor does not owe a duty of care to a non-contracting party (Church v Callanan Indus., Inc., 99 NY2d 104, 111 [2002]). However, the courts have recognized that, under three exceptions, a duty of care to non-contracting parties may arise out of a contractual obligation or the performance thereof, which may

¹ PAC's objection that Collis's deposition was unsigned is not dispositive, since it was certified by the court reporter as accurate (White Knight Ltd. v Shea, 10 AD3d 567, 567 [1st Dept 2004]). Further, upon PAC's request, plaintiff provided PAC with additional copies in November 2007.

subject the contractor to tort liability for failing to exercise due care in the execution of the contract (see id. at 111-12). Thus, a contractor may be potentially liable in tort to third parties where: (1) "the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm;'" (2) the third-party detrimentally relies on the contractor's continued performance of his duties; and (3) the contractor entirely displaces the other party's duty to safely maintain the premises (Espinal, 98 NY2d at 140, quoting H. R. Moch Co. v Rensselaer Water Co., 247 NY 160, 168 [1928]); see also Church v Callanan Indus., Inc., 99 NY2d at 111-12).

Plaintiff does not assert any allegations that would potentially subject PAC to tort liability under the first two exceptions, i.e, that PAC created the bedbug infestation or that plaintiff detrimentally relied on PAC's continued performance of its contractual obligations. Rather, her claim against PAC could potentially come within the third exception - that PAC displaced defendants' duty to safely maintain the premises. Plaintiff's cross claim alleges that PAC had a duty to, inter alia, properly investigate and monitor the Unit for bedbugs during the relevant period, and implement reasonable procedures and take other

actions to minimize the risk posed by bedbugs (PAC's Exh. C, Pl.'s Cross-Claim).

Thus, with respect to the third exception, it is incumbent upon PAC to make a prima facie showing that its "contractual undertaking is not the type of 'comprehensive and exclusive' property maintenance obligation" that could be considered to have assumed defendants' duty to keep the Subject Premises and Unit in a reasonably safe condition (Espinal, 98 NY2d at 141).

In support of PAC's motion, Philip Stravino, PAC's president and owner, maintains that his company provided inspection and extermination services to the common areas of Bristol Plaza, and to specific accommodations that reported an infestation complaint (Stravino Aff. ¶¶ 4-6). He further claims that PAC exterminators would be escorted by a Bristol Plaza supervisor during the servicing of the specific room (id. ¶ 6). To support his description of PAC's services to the units, PAC refers to Hernandez's deposition, wherein she testified, inter alia, that PAC exterminators would provide extermination services to a unit if there was a specific complaint made, and that access to that unit would be made through a Bristol Plaza's floor supervisor (PAC's Exh. K, Hernandez's deposition held on 3/9/007,

at 65-67). Thus, PAC demonstrates that its company had no discretion with respect to the extermination services provided to the condominium units at the Subject Premises, including the Unit, and did not entirely assume defendants' duty to safely maintain the Unit, as required by the third exception.

Since plaintiff's opposition fails to raise an issue of fact with respect to any of the aforementioned exceptions normally giving rise to contractor liability, PAC owes no duty of care to plaintiff, and is not liable in tort (Espinal, 98 NY2d at 141-42; Church, 99 NY2d at 111-12). Thus, the plaintiff's cross claim against PAC is dismissed. In view of the foregoing, this Court need not address PAC's remaining arguments for dismissal of plaintiff's complaint against it.

That branch of PAC's motion for dismissal of the third-party complaint against it is, however, denied. In its supporting papers, PAC's arguments are based solely on dismissing plaintiff's claims against it, and fail to address defendants' claims in the third-party complaint, which seek damages for contribution, contractual and/or common-law indemnification and breach of contract. Thus, PAC fails to make a showing of entitlement to summary judgment dismissing the third-party complaint asserted against it.

Accordingly, it is

ORDERED that the motion by defendants The Olnick Organization, Inc. and Bristol Plaza Hotel for summary judgment dismissing the complaint against them (motion sequence no. 003) is denied; and it is further

ORDERED that the motion by third-party defendant P.A.C. Exterminating Co. for summary judgment dismissing the complaint and third-party complaint against it (motion sequence no. 004) is granted solely to the extent of dismissing plaintiff's cross claim against it; and it is further

ORDERED that within 30 days of notice of entry of this order, plaintiff shall serve a copy of this order upon all parties with notice of entry.

Dated:

December 3, 2008



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Martin.Olnick-bedbug, sj.wpd

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