

Rossi v Syndicated Props. Assoc., Inc.

2009 NY Slip Op 32217(U)

September 22, 2009

Supreme Court, New York County

Docket Number: 109468/04

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**
Justice

PART 5

Rossi, Louis

INDEX NO. 109468/04

- v -

MOTION DATE _____

Syndicated Properties

MOTION SEQ. NO. 09

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, 2,

3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
SEP 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/22/09


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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
LOUIS ROSSI and DEBORAH ROSSI, his spouse,

Plaintiffs,

Index No.
109468/04

- against -

Mot. Seq.
009

SYNDICATED PROPERTIES ASSOCIATES, INC.,
MONTGOMERY TRADING CO. and 8th AVENUE
GOURMET & GROCERY, INC.,

Decision After
Trial

Defendants.

FILED
SEP 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs commenced this action in 2004 to recover for personal injuries sustained when Plaintiff Louis Rossi ("Rossi") fell down a flight of stairs leading to the basement of the premises of 933 Eighth Avenue ("the building"), New York, New York on November 11, 2001. Rossi was a Fire Marshal with the New York City Fire Department ("FDNY"). On November 11, 2001, the FDNY responded to a fire at the building. While Rossi was present at the scene to assist in the investigation into the cause of the fire, he fell down the stairs leading to the basement of the building when the piece of wood at the top of the stairs broke.

A trial of this matter was held before this Court from June 8, 2009 until June 22, 2009 on the issue of liability only, wherein the jury rendered a verdict finding defendant Montgomery Trading Co. ("Montgomery") negligent in failing to maintain the building, and that Montgomery's negligence was a substantial factor in causing Rossi to fall down the stairs. The jury further found that, while Defendant Consolidated Edison's ("Con Ed") negligence was a substantial factor in causing the fire at the building, Con Ed's negligence was not a substantial factor in causing Rossi's fall down the flight of stairs. The jury found no negligence on the part of Rossi.

Montgomery now moves pursuant to CPLR §4404 to set aside the verdict against it, claiming that there existed insufficient evidence to support the jury's verdict. Specifically, Montgomery claims that Plaintiffs failed to establish that Montgomery had either actual or constructive notice of the defective piece of wood at the top of the stairs. Montgomery also asserts that testimony as to the fact that Montgomery was insured unfairly prejudiced Montgomery, also warranting an order setting aside the verdict. Plaintiff submits an affirmation in support of its motion, as well as a memorandum of law in support. Annexed to the affirmation as exhibits are Plaintiffs' complaint and portions of the trial transcript.

Plaintiffs have submitted an affirmation in opposition with a color photograph of the accident location annexed as an exhibit. Montgomery has responded with a reply affirmation, with additional portions of the trial transcript annexed as an exhibit.

CPLR 4404(a) states, in relevant part:

After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon, and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence . . .

The First Department has observed that “[a] trial court is empowered under CPLR 4404(a) to set aside a jury verdict and grant judgment in favor of the losing party where it determines that there is no valid line of reasoning and permissible inferences that could possibly lead a rational person to the conclusion reached” (*Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 349 [1st Dept. 2006]) (citations omitted).

It is well settled that a property owner is liable to those who are injured due to a defect on the property if the owner either caused or created or had actual or constructive notice of the defect (*see Gordon v. American Museum of Natural History*, 67, N.Y.2d 836, 837 [1986]). In order for the owner to have constructive notice of a defect, the defect “must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discovery and remedy it” (*Hayes v. Riverbend Hous. Co.*, 40 A.D.3d 500 [1st Dept. 2007]) (*citing Gordon*). Mere notice of a general or unrelated problem will not suffice; the plaintiff must

demonstrate that the owner had notice of the specific defect which caused the injury (*Hayes* at 500) (citations omitted). Constructive notice will not be imputed to a property owner where the defect is latent, such that it “would not be discoverable even upon a reasonable inspection” (*Bean v. Ruppert Towers Hous. Co.*, 274 A.D.2d 305, 308 [1st Dept. 2000]) (citations omitted).

Upon examination of the record, the court finds that there was sufficient evidence that would allow a rational juror to conclude that Montgomery had constructive notice of the defective or dangerous condition of the top of the stairs leading to the basement.

Initially, Rossi described the area as a “makeshift” piece of wood situated at the top of the stairs. He explained that it broke as he stepped on it, causing him to fall head-first down the flight of stairs. The evidence adduced, including testimony elicited from building superintendent Zenon Wieczorek and Plaintiff’s expert witness, safety expert Howard L. Edelson, support Rossi’s description, and permit a rational trier of fact to conclude that the step was in a defective and or dangerous condition, which was visible and apparent, such that it should have been discovered upon a reasonable inspection. Wieczorek testified during the trial that “the condition of the steps, anything could, you know, shakes or little scratch like squeaky...” (Trial Transcript at 112:15-19). It was also established that the stairs were 75 to 100 years old (*id.* at 92). In addition, Edelson testified that, among other ways of discovering the defect at the top of the stairs, the defect “would have been found by simple inspection, a visual inspection,” and that it was apparent that the pan below the piece of wood which broke under Rossi’s foot was hollow, and could have - indeed, should have - been filled with concrete (*see id.* at 759:6-10, 760:16-22). Additionally, photographs of the area were admitted into evidence during the course of the trial.

The testimony and evidence adduced before the jury establishes a valid line of reasoning from which the jury could find negligence on the part of Montgomery, and Plaintiffs are entitled to the presumption that the jury did in fact follow that line of reasoning (*see Goldstein v. Snyder*, 3 A.D.3d 332, 333 [1st Dept. 2004]) (*citing Rubin v. Pecoraro* 141 A.D.2d 525, 526 [2nd Dept. 1988]). As it cannot be said that it was “utterly irrational” for the jury to find as it did based upon all of the evidence presented, the court may not conclude that the verdict is not supported by the evidence as a matter of law (*see Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 [1978]).

[* 5]

Montgomery's motion on the grounds of references made to insurance coverage during the trial are denied for the same reasons that this Court stated on the record during the trial when it denied Montgomery's motion for a mistrial. To reiterate, that the parties were insured was no secret to the jury, since the allocation of fault as between insurers was one issue before the jury and was mentioned as early as opening statements, when the parties introduced their claims. Additionally, the jury decided liability only, and the premise that a jury would award greater damages where there was insurance is moot. The matters tried before this jury were consolidated solely for the liability trial. It was known at the outset that a separate trial before a new jury would take place at a later date to determine the Rossi damages in the event Rossi prevailed at the liability stage.

Wherefore it is hereby

ORDERED that Montgomery's motion to set aside the verdict is denied in its entirety.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: September 22, 2009



EILEEN A. RAKOWER, J.S.C.

FILED
SEP 28 2009
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NEW YORK