

Evans v Mendoza

2010 NY Slip Op 30702(U)

March 10, 2010

Supreme Court, Queens County

Docket Number: 3084/2004

Judge: Lawrence Vincent Cullen

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

_____ X

VIVIANA EVANS, as Administratrix of
MARIA MIRANDA AVENDANO, et al,

Plaintiffs,

- against -

GERSON MENDOZA,
GAETANO & ASSOCIATES, INC., et al.

Defendants.

_____ X

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Number 3084 2004

Motion
Date October 27, 2009

Motion
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Motion Seq. No. 5

The following papers numbered 1 to 27 read on this motion by defendant Gerson Mendoza pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims; on the cross motion by the defendant Dawn Construction Corp., (Dawn Construction) pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims; on the cross motion by the defendants Steven C. Gaetano, Gaetano and Associates, Inc., and Bruscella Gaetano & Cacioppo, Architects, P.C. pursuant to CPLR 3212, 3212(i) and 214-d for summary judgment dismissing the complaint and all cross claims; and on the cross motion by the plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability against the defendant Dawn Construction.

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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

This is an action to recover money damages for personal injuries and wrongful death allegedly suffered as a result of accident that occurred on August 9, 2003. The accident occurred as premises located at 37-11 221st Street, Bayside, New York. The defendant Mendoza was the owner of the premises. While the defendant Mendoza was having a party on the deck, the deck collapsed causing the death of the decedent, Maria Miranda Avendano and injuries to the other plaintiffs. The deck was in place when it was purchased by the defendant Mendoza. The defendant Steven C. Gaetano was the owner of the premises when the deck was built and the primary architect who designed the deck with help from the firm at which he worked. The defendant Steven C. Gaetano hired a framing company to build the deck. The defendant Dawn Construction Corp. oversaw construction of the deck.

The defendant Mendoza testified at an examination before trial that he is the owner of the premises where the accident occurred. The premises was purchased from non-party Rita O'Connell. He testified that he was not aware of any open permits on the deck and was not aware of any complaints concerning the deck when he purchased the home. Mr. Mendoza testified that the only work he has had done on the deck was that in 1993 or 1994 he replaced a post that supported the first level and three post supporting the second level of the deck. Mr. Mendoza testified that he would power wash the deck every three to four years. He also testified that he had never received any complaints about the deck prior to the accident. He further testified that he never had any problems with the deck. Mr. Mendoza explained that on the day of the accident he was bringing the dog in the house as a surprise party was ongoing when he heard the sound of crunching wood from the deck. He yelled out to the people on the deck to jump off before the deck collapsed. Mr. Mendoza testified that he did not know how the deck was connected to the house until after the accident.

The defendant Steven Gaetano testified at an examination before trial. He testified that he was a previous owner of the premises and when he was the owner he had extensive work done to the home and installed the subject deck. He testified that when the deck was being built he was an architect and worked for the firm Bruscella, Gaetano & Cacioppo, Architects P.C. He testified that he did many of the architectural renderings for the upper and lower decks and the drawings were issued under the professional corporation's name. All the architectural renderings were filed and approved by the New York City Building Department and a new Certificate of Occupancy was issued after inspection by the New York City Building Department. He stated he hired the defendant Dawn Construction to supervise the construction of the deck. Mr. Gaetano testified that he was friends with the president of Dawn Construction, Andrew Montaruli. He further stated that he did not

remember if he had a contract with Dawn Construction. He stated that the renovation of the home, including the building of the deck, took around four months. He testified that Dawn Construction was on site daily to supervise the work that was being done. He testified that he did not recall the framing company he hired to construct the deck and that Dawn Construction did not erect the deck. Mr. Gaetano testified that he sold the house a few months after the deck project was completed. As to the construction of the deck, Mr. Gaetano testified that the deck was made from pressure treated wood, that at the foundation level the deck was supported by steel columns on concrete footings and double two-by-ten girders that supported the two-by-ten deck joists. He further testified that the deck was attached to the house by bolts, either thru-bolts or lag-bolts, which he testified was the good and accepted practice for attaching a deck to a house.

Andrew Montaruli, the President of the defendant Dawn Construction, testified at an examination before trial. He testified that he has been in the carpentry business for sixty years. He testified that Dawn Construction was hired to be the project manager concerning the deck project at the subject premises. He testified that Dawn Construction was onsite to make sure that the contractors followed the architectural plans. Mr. Montaruli testified that he would visit the job site at least two times a day. At the time he was supervising the deck project he was also doing projects at different locations. Mr. Montaruli did not recall the name of the framing contractor which erected the deck. When Mr. Montaruli was asked about the findings of the expert report he stated that bolts and nails were used and that the deck was constructed properly in accordance with the architectural plans.

The plaintiff Maria Chacana testified at an examination before trial. She testified that she was on the rear deck when it collapsed causing her injuries. She testified that on the day of the accident she was on the deck for about five minutes before it collapsed. She testified that she had been on the deck before the accident and never noticed anything was wrong with it and never made any complaints. She testified that prior to the accident no one had told her that there were any problems with the deck. She stated that after the accident she spoke to her sister, Rosa Miranda, who was Gerson Mendoza's mother-in-law, about the accident. Ms. Chacana stated that Ms. Miranda told her that she was mad at Gerson Mendoza. Ms. Chacana claimed that Ms. Miranda told her that Ms. Miranda heard Gerson Mendoza's brother, Junior Mendoza, tell Elizabeth Mendoza, Gerson Mendoza's wife, that there was a problem with the screws in the deck a month prior to the accident. Ms. Chacana also claimed that Ms. Miranda told her that Gerson Mendoza knew about the problem with the deck.

The plaintiff Luis Chacana testified at an examination before trial. He testified that he had been on the deck a few times before the accident and had never noticed any problems

with the deck. He further testified that he was never advised about any problems and never made any complaints about the deck.

The plaintiff Viviana Evans testified at an examination before trial. She testified that on the day of the accident she was attending a party at the premises owned by the defendant Mendoza. While she was on the deck, the deck collapsed causing her to fall to the ground sustaining her injuries. She testified that she had been on the deck numerous times and was never aware of any problems and made no complaints about the deck.

The defendant Mendoza submitted the affidavit and expert report of a professional engineer, George Kulik. Mr. Kulik stated in his affidavit that in his professional opinion, with reasonable certainty, that the deck was improperly constructed and that the defects that were present were not detectable to the defendant Mendoza. The collapse was caused by the use of improper nails where screws should have been used. He further stated that the failure to properly flash the joint between the house and the deck allowed water to seep into the wood and rot away at the wood that held the deck to the house. He concluded that these defects could not have been detected through an inspection by a non-expert.

Thomas Ward, a non-party witness testified at examination before trial. He testified that he is employed as an inspector by the New York City Department of Buildings and inspected the deck on the date of the accident. He testified that he issued two violations to the home owner, the defendant Mendoza on the date of the accident. After the matter was presented at a hearing, there was a plea and no fine as to one violation and there was a fine issued for a second violation for failing to maintain the subject decks. The basis for the finding against the defendant Mendoza was due to the collapse and the inspector determined that the deck wood was rotted, nails were visible in the wood and the deck was not properly attached to the house by bolts.

On a motion for summary judgment, the movant must offer sufficient evidence to establish its prima facie entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). An owner of a premises cannot be held liable for injuries caused by a defective condition unless the owner either created the condition or had actual or constructive notice of the condition (*see, Williams v Century 21, Inc.*, 12 AD3d 364 [2004]; *Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798 [2003]). To constitute constructive notice, the defect must be visible and apparent, which would permit the defendant to discover the condition upon a reasonable inspection (*see, Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473 [2004]). Here, the defendant Mendoza established his entitlement to summary judgment by showing that he did not create the deck or have any actual or constructive knowledge of its defective condition and he could not have found the defect through a visual inspection of the deck.

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (*see, Zuckerman v City of New York*, 49 NY2d 557 [1980]). The plaintiffs failed to raise a triable issue of fact. The plaintiffs' argument that the defendant Mendoza was negligent in failing to inspect the deck and discover the defect is without merit. While a landowner has the duty to maintain his premises in a reasonably safe condition, the failure to make a diligent inspection is only negligence if such an inspection would have disclosed the defect (*see, Lal v Ching Po Ng*, 33 AD3d 668 [2006]; *Curiale*, 9 AD3d at 475; *Lee*, 304 AD2d at 800). Here, the defendant's expert has produced evidence that there was no reasonable method for the owner of the premises to detect the wood rot which caused the accident or the structural deficiencies of the deck. Furthermore, the defendant Mendoza testified that he has conducted periodic examinations of the deck since he purchased the premises and never found any defect.

The cross motion by the Gaetano defendants is granted without opposition. First, as to any claim for architectural malpractice, the plaintiffs did not comply with the ninety day notice requirement in CPLR 214-d, which provides in pertinent part:

[A]ny person asserting a claim for personal injuries, wrongful death or property damage against a licensed architect...or against partnership, professional corporation or limited liability company lawfully practicing architecture which is based upon the professional performance, conduct or omission by such licensed architect...occurring more than ten years prior to the date of such claims, shall give written notice of such claim to each such architect...or such firm...at least ninety days before commencement of any action or proceeding against such licensed architect...or such firm.

Second, as to any cause of action against Steven Gaetano as the home owner, he did not owe the plaintiffs a duty of care as he sold the house over fourteen years prior to the accident. Finally, the defendant Gaetano & Associates, did not come into existence until 13 years after the construction of the deck. Therefore, the causes of action against Steven C. Gaetano, Gaetano & Associates, and Bruscella, Gaetano & Cacioppo, Architects, P.C. are dismissed.

Finally, the Court turns to the cross motion by the defendant Dawn Construction and the cross motion by the plaintiffs for summary judgment on the issue of liability against Dawn Construction. Here, neither party established their *prima facie* entitlement to summary judgment and both cross motions must be denied. Issues of fact exist as to the role Dawn Construction played and the level of supervision and control Dawn Construction had over the construction of the deck and whether the deck was built negligently and with improper material (*see, Sullivan v Main Line Elec. Co.*, 301 AD2d 586 [2003]).

Accordingly, the motion by the defendant Gerson Mendoza for summary judgment dismissing the complaint is granted and the complaint and all cross claims are dismissed against the defendant Gerson Mendoza. The cross motion by the defendants Steven C. Gaetano, Gaetano & Associates, Inc., and Bruscella, Gaetano & Cacioppo, Architects, P.C. for summary judgment is granted and the complaint and all cross claims are dismissed against those defendants. The cross motion by the defendant Dawn Construction for summary judgment dismissing the complaint is denied. The cross motion by the plaintiff for summary judgment on the issue of liability against Dawn Construction is denied.

Dated: March 10, 2010

LAWRENCE V. CULLEN, J.S.C.