Senior v Stark
2011 NY Slip Op 33641(U)
October 24, 2011
Supreme Court, Queens County
Docket Number: 16868/09
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

BARBARA SENIOR,

Plaintiff,

-against-

HAROLD STARK,

Defendant.

Index No: 16868/09

Motion Date: 7/27/11

Motion Cal. No.: 27

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by defendant for summary judgment dismissing the complaint

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.................	5 - 7
Replying Affidavits...........................	8 - 9

Upon the foregoing papers it is ordered that this motion is denied.

On June 28, 2008 at approximately 6:00 p.m. a fire broke out in apartment A2 on the first floor of the premises owned by the defendant and located at 196-03 Jamaica Ave., Hollis, N.Y. The premises is a two story residential building having ten units on each floor. The second floor is accessible only by a single staircase.

The plaintiff, who resided on the second floor in apartment 4B, commenced his action to recover damages for personal injuries she sustained when she jumped from her apartment's second story window in order to escape the fire. Plaintiff claims that the defendant was negligent, inter alia, for failure to comply with various sections of the New York City Administrative Code and fire safety regulations pursuant to Local Law 10 of 1999 which requires that tenants be provided with "Residential Fire Safety Plans and Notices" and must also be posted in the apartment and common area.

In support of his motion for summary judgment dismissing the complaint defendant submitted the deposition testimony of the parties and the Fire Incident Report of the Bureau of Fire Investigation prepared by Anthony Lipary, Battalion Chief. The defendant asserts that any failure of the defendant to post an emergency exit plan was not the proximate cause of the plaintiff's injury since there was only one way to exit the building, i.e. via the staircase, and that plaintiff testified that she knew where it was. Defendant further asserts that he cannot be held liable since the plaintiff's injury was not caused by the fire, but rather by the plaintiff's unforeseeable act of jumping out the window which constitutes a superceding, intervening cause severing the causal connection between any alleged negligence of the defendant and the plaintiff's injury.

In opposition to the defendant's motion, plaintiff submitted, inter alia, the report of her expert, Richard Berkenfeld, P.E. Consulting Engineer and a copy of Local Law 10 of 1999 and a copy of the required the "Fire Safety Notice" thereunder which was to be posted in each unit and a common area. Plaintiff contends that the defendant's negligence in failing to provide the Fire Safety Guides and Notices in accordance with Local Law 10 of 1999 so that she would know what to do in case of fire was why she jumped out the window to avoid the fire.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v. City of New York, 49 NY2d 557, 562 [1980]).

It is well settled that the owner of a building has the duty to maintain its premises in reasonably safe condition (see Basso v. Miller, 40 NY2d 233, 241 [1976]) and, in the City of New York, this duty includes compliance with the Building Code and other statutory mandates, rules and regulations (see Guzman v. Haven Plaza Housing Development Fund Co., Inc., 69 NY2d 559, 564-565 [1987]). Pursuant to Title 3 of the New York City Rules and Regulations § 408-02 (3 RCNY § 408-02 entitled Residential Fire Safety Guides and Notices, formerly 3 RCNY § 43-01, Local Law 10 of 1999 which was amended as of August, 2009, with regard to matters not relevant here) owners of buildings in the City of New York must prepare, post and provide tenants with a fire-safety guide and fire-safety notices. The fire-safety guide is intended to inform occupants of the building of the building's construction, fire protection systems, means of egress, and

evacuation and other procedures to be followed in the event of fire in the building and must be distributed to each tenant (see 3 RCNY §408-02[c][1]). Fire-safety notices are intended to inform occupants of evacuation and other procedures to be followed in the event of a fire (see 3 RCNY § 408-02[d][1]). The Fire Safety Notice must be posted on the interior of the apartment and in the lobby or other conspicuous location in a common area (see 3 RCNY §408-02[d][5][A][1],[2]).

In the instant case, the defendant admitted at his deposition that there were no fire-safety guides or fire-safety notices posted anywhere in the building or given to the tenants. The unexcused breach of an ordinance, rule or regulation is some evidence of negligence provided such violation is a proximate cause of the accident (see Rizzuto v. Wenger Contr. Co., 91 NY2d 343 [1998]; Long v. Forest-Fehlhaber, 55 NY2d 154 [1982]; Woznick v. Santora, 184 AD2d 692 [1992]). The issue of proximate cause is generally an issue of fact to be resolved by the jury (see Derdiarian v. Felix Contr. Corp., 51 NY2d 308, 315 [1980]).

An intervening act will constitute a superseding cause so as to relieve defendant of liability when the act is extraordinary under the circumstances, not foreseeable in the normal course of events or independent of or far removed from the defendant's conduct, that responsibility for the injury may not be reasonably attributed to the defendant (Gordon v. Eastern Ry. Supply, 82 NY2d 555, 562 [1993]; Kush v. City Of Buffalo, 59 NY2d 26, 33 [1983]; Parvi v. City of Kingston, 41 NY2d 553, 560 [1977]). An intervening act, will not be deemed a superseding cause if the intervening act is a natural or foreseeable consequence of a circumstance created by the defendant (see Boltax v. Joy Day Camp, 67 NY2d 617, 619 [1986]; Kush v. City Of Buffalo, supra; Derdiarian v. Felix Contr. Corp., supra). Where only one conclusion may be drawn from the established facts, the conclusion of whether the act is superseding or not can be decided as a matter of law (see Derdiarian v. Felix Contr. Co., supra).

The plaintiff’s act of jumping out the window cannot, as a matter of law, be considered an intervening act such that it constitute a superceding cause of the plaintiff’s injury in this case. It is foreseeable that a person in a burning building may be injured by the fire or smoke and that such person may try to escape from the building and sustain injury while doing so (see Taieb v. Hilton Hotels Corp., 131 AD2d 257, 262 [1987]). Although plaintiff may not have been in immediate danger, the defendant presented no evidence as to how plaintiff could have known this when she was deciding whether or not to jump. The defendant

admitted that no Fire Safety Guide and Notices were posted or given to the tenants to advise them whether the building was or was not fireproof, or how to proceed in case of fire, particularly whether they should stay in their apartment or that they should call 911. In addition, the Fire Incident Report, submitted and relied upon by the defendant, described that upon the arrival of the firemen there was heavy smoke throughout the building visible from the first and second floor, with heavy fire visible on the exposure side. The plaintiff testified that she attempted to exit the building, but could not see or get to the staircase, the only exit from the building, because of very heavy black smoke in the hall. Plaintiff also testified that others had left the building and some had even jumped out the window to escape. Under these circumstances, it cannot be said as a matter of law that the plaintiff's attempt to escape by jumping out the window was unforeseeable or so extraordinary so as to constitute a superceding cause.

Accordingly, the motion is denied as there exist numerous issues of fact as to whether the defendant was negligent and whether such negligence, if any, was a proximate cause of the plaintiff's injury.

Dated: October 24, 2011
D# 45

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J.S.C.