Lang v Wilhelm
2012 NY Slip Op 32803(U)
November 19, 2012
Supreme Court, Suffolk County
Docket Number: 10-14981
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 10-14981

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 004 - MG
005 - MG

KERRIANN LANG, Plaintiff, - against - KENNETH A. WILHELM, BERKOSKI ENTERPRISES, INC. and WEBER AND GRAHN CONDITIONING CORP., Defendants.	SALENGER, SACK, KIMMEL & BAVARO, LLP Attorney for Plaintiff 180 Froehlich Farm Boulevard Woodbury, New York 11797 AHMUTY, DEMERS & MCMANUS, ESQS. Attorney for Defendant Wilhelm 200 I.U. Willets Road Albertson, New York 11507 McGAW, ALVENTOSA & ZAJAC Attorney for Defendant Berkoski Enterprises Two Jericho Plaza, Suite 300 Jericho, New York 11753 CASCONE & KLUEPFEL, LLP Attorney for Defendant Weber and Grahn 1399 Franklin Avenue, Suite 302 Garden City, New York 11530

Upon the following papers numbered 1 to 81 read on these motions for leave to renew ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; 26 - 31 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 32 - 54; 55 - 81 ; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 004) by defendant Kenneth Wilhelm for leave to renew a prior cross motion for summary judgment dismissing the complaint and all cross claims against him is granted, and upon renewal the motion for summary judgment is denied; and it is further

ORDERED that the motion (# 005) by defendant Berkoski Enterprises, Inc. for leave to renew a prior motion for summary judgment dismissing the complaint against it is granted, and upon renewal the motion for summary judgment is denied.

By order dated March 9, 2012, this court denied defendant Kenneth Wilhelm's motion for summary judgment and the motion by defendant Berkoski Enterprises, Inc. for summary judgment based upon a procedural defect. The defect now having been corrected, their requests for leave to renew are granted, and their motions for summary judgment dismissing the complaint against them are determined on the merits.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Kerriann Lang, on November 19, 2007 at approximately 9:45 a.m. when she slipped and fell in the basement of premises located at 57 Robertson Drive in Sag Harbor, New York, and owned by defendant Kenneth Wilhelm. Plaintiff alleges in her bill of particulars that the subject accident occurred in the boiler area of the basement. Prior to the accident, defendant Wilhelm entered into a contract with defendant Berkoski Enterprises, Inc. ("Berkoski Enterprises") to provide fuel oil and oil burner service.

Defendant Kenneth Wilhelm now moves for summary judgment dismissing the complaint and all cross claims against him on the grounds that he neither created the alleged dangerous condition nor had actual or constructive notice of the condition. In support, defendant Wilhelm submits, *inter alia*, the pleadings, his own deposition transcript, and the transcripts of the deposition testimony given by plaintiff, William Berkoski, Jr., a representative of Berkoski Enterprises, and non-party witness William Foster.

At her examination before trial, plaintiff testified to the effect that at the time of the accident, she was employed by Bellringer Security as a security guard, and her duties were to patrol the residence and to check for storm damage, break-ins, fires, leaking, water damage, or cracks. On the day of the accident, while on regular patrol duty, she went down to the basement of defendant Wilhelm's house, where there was an oil burner, and observed "a mixture of water and oil" on the floor. She stated that, although the mixture was leaking into a puddle next to the oil burner, she could not see "where it was coming from." As she walked closer to the oil burner, she tried to touch the spot where the leakage was coming from with her left hand. Then, both her feet slipped out, and she fell backwards. Prior to the accident, she went to defendant Wilhelm's premises four days a week, Monday through Thursday.

At his deposition, defendant Wilhelm testified to the effect that he is the owner of the subject house, which is a secondary residence. He would spend weekends there in the summer, and would use the house once in a while during other seasons. He stated that the house has a security system, and that Bellringer Security, Berkoski Enterprises, and he have a separate security code to gain access to the house. At the time of the accident, he had a service contract with Bellringer Security to come to the house and to monitor for problems including fire, break-in, leakage, or other issues with the heating system. During the summer, Bellringer Security generally performs services five days a week, Monday through Friday, and during the winter, seven days a week. Bellringer Security usually does not come to the premises when defendant Wilhelm is there. There are two oil burners side-by-side in the basement of the house. When there was a water leak in the house in September 2007, defendant Weber and Grahn

Conditioning Corp. repaired it. However, defendant Wilhelm had no recollection as to whether the water leak was in the oil burner room. He stated that on the weekend before the accident, he spent the weekend at the house, and, when he had an opportunity to go into the boiler room, he observed no "leaks or water on the floor or in the boiler room."

At his deposition, William Berkoski, Jr. testified to the effect that he is the owner of Berkoski Enterprises, which is a home heating oil company, and that Berkoski Enterprises delivers home heating oil and maintains customers' oil burners. Prior to the subject accident, Berkoski Enterprises entered into a service contract with defendant Wilhelm. On November 17, 2007, in response to a no-heat call, a Berkoski Enterprises' service technician responded to defendant Wilhelm's house, and found that a feeder valve on one of the heating loops was turned off, and that thermostat wires in the zone panel were improperly connected. The technician turned on the feeder valve, corrected the thermostat wires, and tested the heating system. According to the invoice relating to the November 17, 2007 no-heat call, there was no indication that there was an accumulation of water and/or oil on the floor of the boiler room. On November 19, 2007, a Berkoski Enterprises' service technician was again sent to defendant Wilhelm's house in response to a no-heat call, and performed electrical work on a thermostat in the living room and tested all zones. According to the invoice relating to the November 19, 2007 no-heat call, there was no indication of water, oil, or any liquid on the floor of the boiler room.

At his deposition, William Foster testified to the effect that he is the director of site security of Bellringer Security Patrol ("BSP"), and that BSP provides security patrol services at defendant Wilhelm's residence. Mr. Foster stated that while patrolling, if security guards find something wrong in the customer's premises, they notify the Central Station of Bellringer to notify the owner. Mr. Foster stated that plaintiff was hired as a security guard in August 2007, and that as a part of plaintiff's duties, she was to patrol defendant Wilhelm's premises including an external check and an internal inspection. Mr. Foster further stated that if plaintiff observed a water leak on the floor of the basement, she was not required to conduct further physical inspection with respect to the water itself or the source of the leak.

While, to prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition (see Williams v SNS Realty of Long Is., 70 AD3d 1034), the defendant, as the movant in this case, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (see Romos v Mac Laundry Hemp, Inc., 22 AD3d 822; Kucera v Waldbaums Supermarkets, 304 AD2d 531). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (see Piacquadio v Recine Realty Corp., 84 NY2d 967). Moreover, the issue of actual or constructive notice is irrelevant where the defendant had a duty to conduct reasonable inspections of the premises and failed to do so (see Pommerenck v Nason, 79 AD3d 1716; Weller v Colleges of the Senecas, 217 AD2d 280, 635 NYS2d 990). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (see Clark v AMF Bowling Ctrs., Inc., 83 AD3d 761; Moons v Wade Lupe Constr. Co., 24 AD3d 1005; Fasano v Green-Wood Cemetery, 21 AD3d 446).

Here, defendant Wilhelm has failed to establish his entitlement to judgment as a matter of law. There are questions of fact as to whether a dangerous condition existed on the subject basement floor so as to create liability on the part of defendant Wilhelm; whether he had actual or constructive notice of the alleged condition; whether he exercised reasonable care under the circumstances (see McCummings v New York City Tr. Auth., 81 NY2d 923; Basso v Miller, 40 NY2d 233); whether his alleged negligence was a proximate cause of the subject accident; and whether plaintiff was comparatively negligent (see Bruker v Fischbein, 2 AD3d 254).

Defendant Wilhelm also seeks summary judgment dismissing the complaint against him on the ground that he owes no duty to protect a contractor's employee from hazards resulting from the contractor's methods over which he exercises no supervisory control. Defendant Wilhelm asserts that he is not responsible for the plaintiff's accident because the plaintiff chose to perform her job so incautiously as to injure herself.

When a workman confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources (e.g., a co-worker) to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself (see Spence v Island Estates at Mt. Sinai II, LLC, 79 AD3d 936; Marin v San Martin Rest., 287 AD2d 441; Abbadessa v Ulrik Holding, 244 AD2d 517).

Here, contrary to defendant Wilhelm's assertion, there is no evidence in the record supporting the conclusion that plaintiff's job entailed removing the water on the basement floor or cleaning the floor so as to conclude that the accident was caused by a condition inherent in her work. Moreover, there is no evidence demonstrating that plaintiff confronted an obvious hazard and nevertheless chose to perform her job incautiously (see Vega v Restani Constr. Corp., 73 AD3d 641). As discussed above, there are questions of fact as to whether a dangerous condition existed on the subject basement floor, whether the condition was an obvious hazard, and whether plaintiff was comparatively negligent. Accordingly, defendant Wilhelm's motion for summary judgment is denied.

Defendant Berkoski Enterprises moves for summary judgment dismissing the complaint against it on the grounds that it was not liable for the plaintiff's accident, and that the accident was not attributable to its negligence. In support, Berkoski Enterprises submits, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff, defendant Wilhelm, William Berkoski, Jr., a representative of Berkoski Enterprises, and non-party witness William Foster.

Liability 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 (see Breland v Bayridge Air Rights, Inc., 65 AD3d 559; Ruffino v New York City Tr. Auth., 55 AD3d 819; Noia v Maselli, 45 AD3d 746]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that he or she did not create the defective condition (see Noia v Maselli, supra; Franks v G & H Real Estate Holding Corp., 16 AD3d 619).

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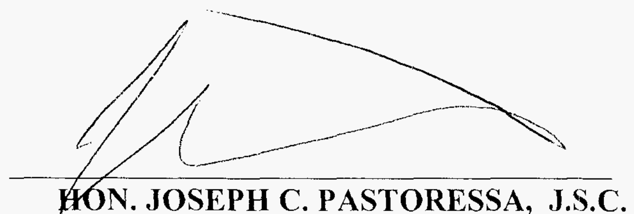
In opposition, defendant Weber and Grahn Conditioning Corp. ("Weber and Grahn") contends that the subject burner has been maintained by Berkoski Enterprises, and that the accident was attributable to the negligence of Berkoski Enterprises. Weber and Grahn submits, *inter alia*, the affidavit of Gregory Grahn, the Vice President of Weber and Grahn. In his affidavit, Mr. Grahn explained that the boiler contains a pressure relief valve which is a safety device that prevents the boiler from exploding, and that if a thermostat to the boiler malfunctions, the pressure relief valve is caused to open, thus permitting water to escape. Mr. Grahn indicated that, as demonstrated by Berkoski Enterprises' January 29, 2007 work ticket and May 11, 2007 computer printout for work performed on May 5, 2007, the aquastat relief valve, which can trigger the pressure relief valve, was twice replaced, and that, according to the October 12, 2007 computer printout for work performed by Berkoski Enterprises on October 6, 2007, a water leak was found, and rusty water was observed on the floor. He explained that rusty water evidences a significant chance that the water came from the boiler system. He further stated that on November 17, 2007, Berkoski Enterprises' technician observed that the feeder valve, which is the pressure reducing valve, was turned off, indicating the failure of the control of the water pressure.

Here, the adduced evidence indicates that the subject boiler system has been maintained by Berkoski Enterprises, and that the system had several problems relating to the pressure relief valve prior to the subject accident. The evidence also indicates that upon receiving a no-heat call, a Berkoski Enterprises' technician was sent to defendant Wilhelm's premises on November 17, 2007 and November 19, 2007. On November 17, 2007, after the Berkoski Enterprises' technician found that the feeder valve was turned off, and thermostat wires in the zone panel improperly connected, he turned on the feeder valve, corrected the thermostat wires, and tested the heating system. Defendant Weber and Grahn raised several issues of fact as to whether Berkoski Enterprises' technician's work was properly performed on November 17, 2007; as to whether the alleged water leak was coming from the boiler system maintained by Berkoski Enterprises; and as to whether Berkoski Enterprises created or had notice of the alleged condition. Accordingly, defendant Berkoski Enterprises' motion for summary judgment is denied.



Dated: November 19, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**