

Fernandez v Assured Environments, Inc.

2013 NY Slip Op 31562(U)

July 12, 2013

Supreme Court, New York County

Docket Number: 115625/08

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

LISSETTE A. FERNANDEZ, as parent and natural guardian of WILISA FERNADEZ, infant under the age of fourteen years, and LISSETTE A. FERNANDEZ, individually,
Plaintiffs,

Index No.: 115625/08

Motion Date: 09/21/12

Motion Seq. No.: 03

Motion Cal. No.: _____

- v -

ASSURED ENVIRONMENTS, INC. and MILFORD REALTY, LLC,
Defendants.

FILED

JUL 17 2013

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 3 were read on this motion for summary judgment

PAPERS NUMBERED	
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits - Exhibits	<u>3</u>

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

Cross-Motion: Yes No

Upon the foregoing papers,

In this action for personal injury, defendant Milford Realty, LLC (Milford) moves, pursuant to CPLR 3212, for summary judgment in its favor dismissing both the complaint as against it and any cross claims (Mot. Seq. 003). Defendant Assured Environments, Inc. (Assured) moves, pursuant to CPLR 3212, for summary judgment in its favor dismissing the complaint as against it (Mot. Seq. 004). Motion sequence numbers 003 and 004 are consolidated for disposition.

Plaintiff Lisette A. Fernandez (Fernandez) lived with her

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):

daughter Wilisa Fernandez (the Child) at 448 West 163rd Street, New York County (the Building). Milford owned and/or operated the Building, where, allegedly the Child was bitten by a mouse on February 20, 2008. The Child was eight years old at the time. She was taken to a hospital emergency room, treated and released. Assured had a contract with Milford to perform pest control and extermination services in the Building.

Fernandez was deposed on July 1, 2010, with the assistance of a Spanish translator. She said that she moved into a second-floor apartment in the Building in December 2006 with the Child and Fernandez's companion, William Rodriguez (Rodriguez), the Child's father. Fernandez's teenage son came to live with them some time after the incident. She testified that she "saw a lot of little mice and cockroaches" in her apartment during the first year of occupancy. She responded by "[p]utting down traps, a lot of traps all the time, poison for the little mice." She recalled complaining just once in the first year to the super and his assistant, Venicio, about the cockroaches and little mice. An exterminator came to her apartment after her complaint, but she did not know the name of the company. She only remembered that the man who came wore a uniform.

Fernandez complained to Venicio again at a later date, but before the incident. She said that she saw "more mice than cockroaches," and they were "[e]verywhere." She testified that

the Child became familiar with the sight of mice. Fernandez thought that the visit from the exterminator had no effect. The super allegedly told her that the exterminator would visit monthly, but he never did. She never spoke or communicated to anyone else representing the Building about the problem, except the super and his assistant. She said that she spoke to the Building's owner about moving into the building next door, with the same ownership, to get more space and to live on the first floor, which she preferred. She did not tell the landlord about her apartment's pest problem.

When Venicio came to her apartment to deal with a leaking radiator in her bedroom, they found holes in the bedroom floor after moving some furniture. She suspected that the mice entered through these holes. Venicio closed these holes, and she and Rodriguez closed holes they found in the kitchen.

Fernandez testified that, on February 20, 2008, the Child was sleeping with her, when Fernandez arose to go to the bathroom, between six and six-thirty in the morning. When she heard her daughter scream, she ran back into the bedroom. The curtains in the bedroom were closed, and the room "was somewhat dark." Fernandez turned the light on when she went back into the bedroom, and saw the Child "full of blood, it's coming from her nose." There was also blood on the bed sheet. "There was a lot of blood. It wasn't so big - it wasn't that big that it filled

up the whole bed but sufficient blood or a lot of blood came out of her; also it was clotted, her clotted blood too." Fernandez stated the Child never had a problem with nosebleeds.

The Child was screaming that a mouse bit her. Fernandez did not see any mouse. Her daughter "told me screaming, mommy, I saw the mouse, I saw the mouse." The Child said that "it was a little mouse," not a rat. Fernandez testified that she herself "could see the little footprint because the blood was there, the trail was there." The "mouse prints" were on the bed sheets, not the bedroom floor. When she washed her daughter's face, Fernandez said that she did not see any cuts on her nose. However, she was shown "the bite mark" in the emergency room. She said that the Child never had been bitten by an animal before this incident, but subsequently a dog bit her.

Fernandez testified that the Child's pediatrician called 311 to report the incident. The responding agency "checked the whole entire apartment[,] . . . found several holes . . . [and] closed them up." They also discovered "a rats's (sic) nest" under the breakfast bar, dividing the kitchen from the living room. There "was newspaper there, rat poop." Fernandez stills sees mice in the apartment, in spite of the measures taken. She has also complained to Venicio again.

After the trip to the emergency room and a visit to the Child's pediatrician, Fernandez said that she treated the wound

for several days with soap and water, and "antibiotics they gave me in the hospital." Her daughter also visited a psychologist because of changes in mood and behavior.

"She was very anxious. She was going to the refrigerator every second to eat. That was not the way that she would act. She did not want to sleep in the bed alone. She did not want to be alone in the bathroom. She told me that she would have dreams with the little mouse, as she called him, and so for that reason."

In spite of visits to two psychologists, the Child "still has her nightmares," according to Fernandez. "She is still scared in the street. . . . She still takes a bath with - I mean a shower, with the door open."

The Child was deposed on April 28, 2011. She recalled that she saw mice in her apartment before the incident, more than five times, less than 10 times. She saw the mice in different parts of the apartment. They were mice, not rats. She described the incident as follows:

"I was sleeping and I felt something biting on my nose. I felt like - I woke up. I sat down. I felt, like, my nose was running so I wiped it, and saw that I had blood on my hand, and I saw, like, a little mouse just running away."

The Child did not remember screaming. She said that the bedroom was dark, but "the light of the TV was on." "I just, like, I saw the mouse and I got a little bit scared, that was pretty much it." She saw the mouse "running off the bed." She called for her mother, saying "Mom, I'm bleeding," and told

Fernandez that a mouse bit her. The Child thought that the mouse bit her because "there was nothing else that could have caused me bleeding on the bed besides the mouse." She saw little, bloody footprints on the sheet. She testified that her mother and father also saw the mouse prints on the bed.

Since then, the Child said that she has had nightmares replaying the incident and other nightmares where she saw "a whole bunch of mice coming up to me and, you know, like, it was just scaring me seeing so much mice." Using the past tense, she testified that, "[w]hen I would take a shower, I needed to leave the [bathroom] door open 'cause I was afraid that a mouse would come in." Also, "when I would be walking in the streets, I would be afraid to go near trash 'cause I was afraid that a mouse would come out." She stated that she did not have any problems at school as a result of the incident.

The psychologist has taught her "techniques . . . [to] conquer stress or nervousness." Their sessions are "just about the mouse really."

Carmen Olenick (Olenick), the Child's psychologist, testified on March 27, 2012. Olenick's account of what she first learned from Fernandez was more dramatic than the testimony of Fernandez or the Child.

"[Fernandez] heard her daughter screaming . . . something to the effect that a rat has bitten her nose and that the girl was extremely frightened and the blood again was coming out, that they look inside her

nose and then - with a flashlight and ask - they saw that she was bitten inside the nose because they didn't know where exactly, but they saw - apparently they saw a little hole or something there and then the child - they asked the child to blow her nose because there was more coming and then she - there was a tremendous amount of coagulation that came out and that really scared them tremendously."

Working from her case notes, Olenick testified that the Child told her of keeping the bathroom door open while showering, and of her nightmares.

The Child's last appointment with Olenick was May 10, 2011, 10 months prior to this deposition.

Carlos Aranky (Aranky), the Building's superintendent, a Milford employee, was deposed on December 15, 2011, with the assistance of a Spanish interpreter. He testified that he is the superintendent for three adjacent buildings on West 163rd Street, and that he lives at 452 West 163rd Street, two doors away from the Building. He started this job in mid-2010, at least two years after the incident. Henry Alejo was the superintendent then. He did not have Alejo's current address or telephone number. Venicio left his job in the Building when Aranky began.

Aranky said that exterminators come monthly to do the apartments in the Building. A notice is posted in the hallway monthly to advise the tenants of the scheduled date. Tenants can refuse entry to the exterminator, and Aranky does not have apartment keys. Although he had been in Fernandez's apartment to make repairs, he said that she has never complained to him about

pests.

Barry Beck, Assured's chief operating officer, testified on December 15, 2011. He estimated that Assured had provided pest control services to the Building until sometime in 2009. According to his company's records, it serviced the Building monthly. The super directed him to specific apartments, if needed; otherwise the Building's public areas were inspected and treated. The public areas included the lobby, basement and mechanical rooms, but not the hallways unless by the landlord's request, at an extra charge. Assured "does not knock on doors. That is not our policy."

Each apartment visit generated a service ticket, which was logged into a computer. Beck testified that Assured kept its computerized records for years back. In preparation for his deposition, he examined the Building's records for all of 2007 and early 2008. He said that there was no service ticket entry for Fernandez's apartment, number 23, in that period, which included all of the year prior to the incident. He concluded that no one from Assured entered Fernandez's apartment from January 2007 through February 2008. Beck also stated that his records did not show any treatment on the Building's hallways during that period.

Beck identified one service ticket for a special visit to the Building on December 11, 2007 to deal with mouse activity in

apartments 4C and 5C. He identified another service ticket for an apparently routine visit to the Building on February 20, 2008, the date of the incident. Nothing out of the ordinary was recorded on February 20, 2008 ticket. However, another service ticket showed that a special visit was made to one of the three adjacent Milford buildings the very next day. While the service ticket did not state the particular location for the special visit, it was coded for mice, and was signed by "William Rodriguez," the presumptive occupant of the apartment visited. The ticket showed that Assured found one or more holes in the wall and applied a rodenticide. There was no indication that the hole was sealed, which is often the case when "a tracking powder" is used, according to Beck.

"The proponent of a motion for summary judgment [pursuant to CPLR 3212] must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" People v Grasso, 50 AD3d 535, 545 (1st Dept 2008), quoting Zuckerman v City of New York, 49 NY2d 557, 562

(1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (1st Dept 2002). Where a party fails to meet its prima facie burden, its summary judgment motion shall be denied regardless of the sufficiency of the opposing papers. Matter of Siegel, 90 AD3d 937, 940 (2d Dept 2011), citing Winegrad, 64 NY2d at 853.

Plaintiff's verified bill of particulars states that the Child "was bitten by a rat," while the complaint and the testimony of Fernandez and the Child consistently referred to "a mouse" or "a little mouse." Both testified to the presence of mice before the incident, and the service tickets produced by Assured, when Beck testified, sufficiently establish that mice were present in the Building at or near the time of the incident. Also, undisputed is the Child's visit to the emergency room on February 20, 2008. The record of that visit states that she "was sleeping & the rat bit her in her nostril," information she or her mother must have provided. "Two intranasal lesions (L) nare [nostril]" were observed; one "1/3 cm in diameter," and one "1/3 cm long." However, the medical record provides a different chronology than all other sources: "Two days ago, while sleeping, pt was bitten twice in her interior portion of left nares." This disparity, in itself, does not significantly compromise

plaintiffs' case.

"Although the absence of direct evidence of causation would not necessarily compel a grant of summary judgment in favor of the defendant, as proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone."

Hartman v Mountain Val. Brew Pub, 301 AD2d 570, 570 (2d Dept 2003).

The Child testified to being awakened because she "felt something biting on my nose." She cried out to her mother, according to the testimony of both of them, and said that she saw a mouse running across the bed sheets. The visit to the emergency room disclosed two small wounds to the Child's nose. Fernandez testified that she had complained to the Building's superintendent and his assistant about mice in her apartment. Under these circumstances, based on logical inferences from the record, there is a triable issue of material fact concerning Milford's liability for negligence in maintenance of the Building. Finley v 102-106 W 143rd St Realty Corp, 9 Misc2d 367 (App Term, 1st Dept 1957). Therefore, Milford's motion for summary judgment is denied.

The complaint originally filed solely against Assured charged that it "failed to keep the subject premises properly exterminated and free from rodent infestation . . . [and] had knowledge of the presence of hazardous rodent infestation in the tenant's apartment. Even assuming the truth of these statements,

Assured has no liability for plaintiffs' alleged injuries.

Beck testified that Assured serviced the Building at the time of the incident. While no written contract between Milford and Assured has been produced, there is no doubt that they had an on-going relationship "for a number of years." As a contractor for exterminator services, Assured's responsibility was to Milford, not to tenants of the Building, regardless of the quality or efficacy of its services.

A party to a contract for services may be potentially liable in tort to third persons:

"(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." Espinal v Melville Snow Contrs., 98 NY2d 136, 140 (2002) (internal quotation marks and citations omitted).

Assured launched no instrument of harm in the Building. Fernandez and the Child did not rely to their detriment upon Assured; Fernandez testified to seeing an unidentified exterminator only once before the incident. At all times, Milford, the landlord, remained in control and responsible for the condition of the Building.

Assured may have breached its agreement with Milford by not providing adequate exterminating services, but no liability to

