

Villalobos v Shannon
2013 NY Slip Op 33421(U)
December 18, 2013
Supreme Court, Suffolk County
Docket Number: 09-48761
Judge: Hector D. LaSalle
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SHORT FORM ORDER

INDEX No. 09-48761
CAL No. 12-02087OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 1-22-13 (#002)
MOTION DATE 4-2-13 (#003)
ADJ. DATE 9-24-13
Mot. Seq. # 002 - MD
003 - MD

-----X

RONALD VILLALOBOS, LAURA
FERNANDEZ and SABASTIAN VILLALOBOS,
an infant under the age of 14 years, by his mother
and natural guardian, LAURA FERNANDEZ,

Plaintiffs,

- against -

MICHAEL SHANNON and C.W. PULVER, INC.
d/b/a PULVER GAS,

Defendant.

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Upon the following papers numbered 1 to 57 read on these motions for summary judgment ; Notice of Motion/
Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ; Notice of Motion/
Order to Show Cause and supporting papers 16 - 32 ; Answering Affidavits and supporting papers 33 - 50 ; Replying Affidavits
and supporting papers 51 - 57 ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (002) by defendant Michael Shannon for an order granting summary
judgment and the motion (003) by defendant Inergy Propane LLC/Pulver Gas sued herein as C.W. Pulver,
Inc. d/b/a Pulver Gas for an order granting summary judgment are consolidated for the purposes of this
determination; and, it is further

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ORDERED that the motion by defendant Michael Shannon for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims against him is denied; and it is further

ORDERED that the motion by defendant Inergy Propane LLC/Pulver Gas sued herein as C.W. Pulver, Inc. d/b/a Pulver Gas for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims against it is denied.

This action was brought by plaintiffs to recover damages for injuries allegedly sustained by them as a result of a fire which occurred at their home located at 47B Shinnecock Road, Hampton Bays, New York on July 20, 2009. Plaintiffs, Ronald Villalobos and Laura Fernandez, rented the house at the said location from defendant Michael Shannon pursuant to a written lease dated May 7, 2009. They resided thereat, with their son, Sabastian Villalobos (an infant under the age of 14 years), from May 15, 2009 until a fire destroyed the house on July 20, 2009. Plaintiffs allege that they complained to defendant Michael Shannon, the landlord ("defendant landlord"), about an odor of gas in the house prior to July 20, 2009 and that he did not inspect or correct same. Additionally, plaintiffs claim that defendant Inergy Propane LLC/Pulver Gas sued herein as C.W. Pulver, Inc. d/b/a Pulver Gas ("defendant gas company"), was negligent in its inspection of a gas leak and in filling a propane gas tank despite a gas leak.

Defendant landlord moves for summary judgment and an order dismissing the complaint and cross claims against him, claiming that plaintiffs cannot show that any action or inaction by him was the proximate cause of the fire, that he was an out-of-possession landlord with no duty to inspect, maintain, or repair the gas tank or gas line pursuant to the terms of the lease, and that he neither created the condition nor had actual or constructive notice of it. In support of his motion defendant landlord submits copies of the pleadings, verified bill of particulars, transcripts of the parties' depositions, the lease, and the Town of Southampton Department of Public Safety Fire Investigation report.

Defendant gas company moves for summary judgment and an order dismissing the complaint and cross claims against it, claiming that plaintiffs cannot establish a *prima facie* case of negligence against it. Defendant gas company maintains that its employee properly tested the propane gas tank, propane gas lines, and the propane gas fed appliances, and that plaintiff has set forth no evidence to show that there was a gas leak emanating from the hot water heater as of June 26, 2009 (the date its employee filled the tank with propane). In support of its motion defendant gas company includes, *inter alia*, copies of the pleadings, verified bill of particulars, transcripts of the parties' depositions, the Town of Southampton Department of Public Safety Fire Investigation report, and an affidavit from its expert, Robert Gordon, P.A.

The testimony of plaintiff Ronald Villalobos revealed that on Monday, July 20, 2009 he was burned as a result of fire in the house he rented from defendant landlord. Plaintiff Ronald Villalobos stated that he signed a lease for premises known as 47B Shinnecock Road and moved into the one floor, single family house with his wife and son on May 15, 2009. He claims that he stored his tools in a utility room located within the house and that on the date and time of the fire he was organizing his tools within that room, although he "[doesn't] know what happened" and doesn't remember being on fire. Plaintiff Ronald Villalobos testified that he started smelling gas in the house, not outside by the propane tank, within days of moving into it and that he did not know where the odor was coming from but that it was throughout the

house. He contended that although he never spoke to defendant landlord about a smell of gas, his wife, plaintiff Laura Fernandez, called defendant landlord and left a message on his answering machine that the house smelled of gas. Plaintiff Ronald Villalobos insists that he personally went to defendant gas company and told them that he smelled gas in the house and requested that they fill the propane tank with some gas (not too much as he did not have enough money to fill it completely). He stated that a woman at the defendant gas company's office stated in response to his claim that he smelled gas, "don't worry about it. Once the gas tanks start to become empty, there's an odor of gas, but once the gas tank gets refilled, it will be okay." Mr. Villalobos averred that within days a man from defendant gas company delivered gas and that although the gas smell was not the same as before, he still noticed a little gas smell after the delivery, and that he called and spoke to a woman at defendant gas company on the phone about same.

During her examination before trial plaintiff Laura Fernandez stated that she and her husband rented the house known as 47B Shinnecock Road from defendant landlord in early May 2009 and that she first met the landlord when he showed up at the house to turn on the pilot for the hot water heater located in the utility room. She indicated that he did this on the day after they moved into the house, and that they had not called him to do this. Ms. Fernandez indicated that when they first moved into the house it had a paint smell and that they first started smelling gas 2 to 3 weeks after they moved into the house (at first it was a faint smell but "as time passed it started getting stronger and throughout the house"). She maintained that the smell of gas was stronger in the kitchen and that although she called defendant gas company for a price quote, she never called them for a gas delivery or to complain about the smell of gas. Plaintiff Laura Fernandez stated that she personally contacted defendant landlord about the odor leaving a voice mail "that there was a weird — a smell, a gas smell in the kitchen and [she] think[s] that there's something wrong with the stove" and asking him to call her back. She contends that defendant landlord did not call her back with regard to the smell but did call in early July about late rent and on another occasion about a barking dog. Ms. Fernandez testified that someone from defendant gas company came to deliver gas about a day or two after her husband went there to ask for a delivery and complain about the gas smell, and that the man told her the tank was low which was why it was releasing a gas smell. He did some type of test in the boiler room and in the area of the stove, however she did not see him do anything with regard to the boiler or the hot water tank, and the smell of gas stayed the same in the house after the man left.

Concerning the date of the accident, plaintiff Fernandez stated that her husband, plaintiff Villalobos, was putting down his tools in the boiler room, the door to the boiler room shut automatically, and after he was in the room less than a minute she heard a bang. She claimed that the door swung open hitting the counter, that there was a bang and a big roar, and that she saw a fireball coming out of the room. The family exited the house which was a total loss as a result of the ensuing fire.

Defendant landlord testified during his examination before trial that the house he rented to plaintiffs at 47B Shinnecock Road was equipped with a gas hot water heater and a furnace in a "utility room" and that the plaintiffs were responsible to obtain contracts for servicing of the utilities pursuant to the terms of the lease. However, he admitted that he owns other rental houses and that he did not always follow through with enforcing that provision of the leases. Defendant landlord contends that he did not meet plaintiffs before they moved into the subject house but met them soon after because plaintiff Fernandez had called to say she did not have hot water and he went over to take a look at the situation. He maintained that he looked at the hot water heater and followed the instructions to light the pilot but told plaintiff Fernandez to call Pulver

(because its label was on the propane gas tank) when it did not go on. Defendant landlord assumed that defendant gas company lit the pilot for the hot water heater because he did not do so. Finally, he insisted that he never had a conversation with plaintiffs about a smell of gas prior to the fire and that there were no complaints left on his answering machine by plaintiffs about a gas odor.

Paul Ciochetto, an employee of defendant gas company at and prior to July 2009, testified that his job duties at that time entailed occasionally making propane gas deliveries to homes in the Southampton area and to inspect homes for gas leaks. He admitted that prior to July 20, 2009 he had been to the premises known as 47B Shinnecock Road, but did not recall the number of times he had been there. He stated that he met the plaintiffs on June 26, 2009 when he made a propane gas delivery at the subject house pursuant to a delivery ticket he received in the morning from the office, and that there was nothing on that ticket to indicate that plaintiffs had made a complaint about a gas odor. Mr. Ciochetto claimed that he delivered 57 gallons of propane, that he had conversations with plaintiffs Ronald Villalobos and Laura Fernandez but that he did not recall the conversation regarding a smell of gas in the home, complaints from them about problems with gas in the home, or if either party told him that they had detected an odor of gas in their home. Mr. Ciochetto recalled that the tank was empty and that he shut off the tank, put in 57 gallons of gas, and checked the hot water heater and range for leaks (because it is done when there is an interruption in service). He did not detect an odor of gas when he entered the utility room, and did conduct a bubble leak check at the hot water heater but does not recall if he did same to the boiler itself. Finally, he stated that he did a full system leak check and that he did not detect any type of gas leaks.

Pertinent portions of the lease provide that “[t]enant must pay for the following utilities and services when billed: gas, water, electric, fuel, telephone, gardening, exterminating. Maintenance service contracts shall be maintained, continued and paid for by Tenant. These charges will be added to the rent. ... Tenant must obtain a service contract with an oil burner company that covers any breakdown and maintenance. Tenant also must obtain a gas contract to cover hot water heater maintenance and repairs.”

Pertinent portions of the certified copy of the Fire Investigation Report of the Town of Southampton Department of Public Safety dated August 6, 2009 state as follows:

The water heater was examined and not eliminated a gas leak was fund [sic] at the water heater control valve.

...

The fire originated in the utility room area. ... the water heater could not be eliminated because the gas leak found at the control valve (see attached photos taken by undersign depicting bubbles coming from the control valve indicating leak).

...

It is recommended to have the water heater further investigated by a qualified engineer.

An affidavit by Robert Gordon, P.A. submitted by defendant gas company, indicates that, in his opinion, “Paul Ciochetto performed the task of reintroducing propane services to [the] residence properly.” While plaintiffs’ expert Paul W. Moody, avers that, “assuming the accuracy of the Fire Marshall’s report and photos, the nature and extent of the leak, as well as the testimony of [plaintiffs]... I am certain to a reasonable degree of gas expertise certainty, that the leaks that were found and documented by the Fire Marshall in his photos, existed at the time [defendant gas company] allegedly tested the propane tank and appliances for leaks ... three (3) weeks before the fire.” He also declared that the manual gas valve installed on the hot-water heater should not have been used as it was not a listed gas valve and that a sediment trap was not installed on the gas line inlet as required by the National Fuel Gas Code NFPA-54. Mr. Moody contended that these were code violations and that defendant landlord failed to make proper inspections and failed to correct a dangerous condition.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141[1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

A landowner has a duty to maintain its premises in a reasonably safe condition (*see Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Guilani v Union Free School Dist. #1*, 70 AD3d 632, 895 NYS2d 453 [2d Dept 2010]; *Van Dina v St. Francis Hosp., Roslyn, N.Y.*, 45 AD3d 673, 845 NYS2d 430 [2d Dept 2007]). “That duty is premised on the landowner’s exercise of control over the property . . . as the person in possession and control of property is best able to identify and prevent any harm to others . . . Thus, a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property” (*Gronski v County of Monroe*, 18 NY3d 374, 379, 940 NYS2d 518, 521 [2011] [internal quotation marks and citations omitted]). Generally, “[a]n out-of-possession landlord is . . . not responsible for injuries that occur on [the] premises unless [he] has retained control over the premises or is contractually obligated to maintain or repair the alleged hazard” (*Utica Mut. Ins. Co. v Brooklyn Navy Yard*, 83 AD3d 817, 819, 921 NYS2d 287, 289 [2d Dept 2011]). “Control may be evidenced by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the

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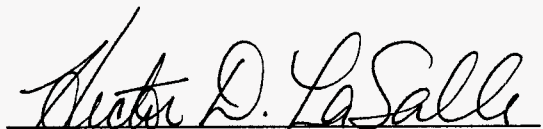
premises” (*Euvino v Loconti*, 67 AD3d 629, 631, 888 NYS2d 571, 573 [2d Dept 2009]). “Reservation of a right of entry for inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural or design defect” (*Knipfing v V&J, Inc.*, 8 AD3d 628, 629, 779 NYS2d 244, 245 [2d Dept 2004]).

Although defendant landlord was not obligated by the terms of the lease to maintain or repair the allegedly defective hot water heater or boiler, plaintiffs’ expert indicated that there were code violations in connection with the gas valve on the hot water heater and lack of a sediment trap on the gas line inlet. Additionally, plaintiffs testified that defendant landlord knew of the odor in the house, yet failed to make any inquiry or take any steps to remedy same. Despite his contention that he never had notice of the alleged smell prior to the fire, the court cannot render a judgment as to which party is more credible and must view the evidence in favor of plaintiffs (*see S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, *supra*; *Benincasa v Garrubbo*, *supra*). Thus, plaintiffs have shown the existence of an issue of fact in connection with the possible liability of defendant landlord due to his failure to address or remedy the situation and to correct a statutory violation (*see Knipfing v V&J, Inc.*, *supra*) and his motion for summary judgment dismissing the complaint and cross claim against him is denied.

With regard to defendant gas company, issues of fact exist as to whether a proper and thorough inspection of the hot water heater, appliances, boiler, and their gas lines was conducted. As Mr. Ciochetto had no recollection of whether plaintiffs complained of a smell of gas, no determination can be made at this time as to whether he took the proper steps to remedy such a situation. Although its expert averred that Mr. Ciochetto “performed the task of reintroducing propane services to [the] residence properly”, he does not assert that the proper procedures were followed for a gas smell/leak nor does he mention the possible code violations. Accordingly, the motion by defendant gas company for summary judgment dismissing the complaint and cross claim against it is denied.

The foregoing constitutes the Order of this Court.

Dated: December 18, 2013
Riverhead, NY


HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION