Davis v Kiva Realty Co & Leor Mgt. Corp.
2013 NY Slip Op 33723(U)
November 25, 2013
Supreme Court, Bronx County
Docket Number: 304497 /10
Judge: Mark Friedlander

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

ARLENE DAVIS,

Plaintiff,

-against-

KIVA REALTY CO & LEOR MANAGEMENT CORP

Defendants.

DECISION/ORDER
Index No.304497/10

Present:
HON. MARK FRIEDLANDER
J.S.C.

The following papers numbered 1 to 5 read on this motion on the calendar of March 25, 2013

Papers Numbered

Notice of Motion & Cross-Motion Order to Show Cause, Affidavits and Exhibits Annexed.....1-2, 3-4.....
Answering Affidavits and Exhibits Annexed.....5.....
Replying Affidavits and Exhibits Annexed.....

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision.

DEC 0 2 2013

Dated: 11/25/13

MARK FRIEDLANDER, J.S.C.

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

ARLENE DAVIS,

Plaintiff,

-against-

KIVA REALTY CO & LEOR MANAGEMENT CORP.,

Defendants.

MEMORANDUM DECISION/ ORDER
Index No.304497/10

HON. MARK FRIEDLANDER:

Plaintiff moves this Court for partial summary judgment, determining the issue of liability in her favor. Defendants cross-move for dismissal of plaintiff's complaint. However, because the cross-motion was served late, the Court, after a telephone conference with the parties, informed both counsel that the cross-motion would be considered only insofar as it constituted opposition to plaintiff's motion. Plaintiff was also given time to reply to such opposition.

This action arises out of injuries allegedly sustained by plaintiff on July 7, 2009, when a portion of her bathroom ceiling fell on her as she was brushing her teeth at the sink. Defendants are the owner and managing agent of the multiple dwelling in which plaintiff resided. In her deposition testimony, plaintiff related that she or other persons in her apartment had twice complained to the building superintendent about the bathroom ceiling. Once, nearly six months before the accident, the ceiling above the tub became discolored and began dripping water, and the superintendent, after being told about it, patched it with plaster the next day. Several months later, the same condition recurred, except that the discolored area was larger but there was no water leak, and the super, upon being told, re-plastered the area during that same week. Several months thereafter, the ceiling "came down" without warning.

The super testified that he only remembered coming to inspect and repair a leaky ceiling in plaintiff's

apartment on one occasion. At that time, he re-plastered the ceiling and also checked the upstairs apartment, where he found the resident had just showered. After checking the bathtub drainage and finding it waterproof, he decided to re-grout the bathroom floor of the upstairs apartment. The super also acknowledged that he had been called to the upstairs apartment once or twice to repair a leaking bathtub faucet "at the beginning of the summer" of 2009. (No written records were kept). The super conceded that water from such faucet could have leaked down. When the super was called to plaintiff's apartment after the ceiling fell, he found plaintiff sitting on the bathroom floor, crying, and saw a hole in the ceiling about four feet square, with debris on the floor below it. According to the super's testimony, the cause of the event was ultimately found to be a leak in the connection between the bathtub and the water pipes (referred to as the "standing weight") in the apartment above.

Based on the above account, plaintiff argues that actual and or constructive notice has been established by complaints to the super, and that there remains no issue of fact as to defendant's liability for failure to reasonably maintain the ceiling, as it is clear that the previous repairs were inadequate. Defendants counter that each complaint from plaintiff's apartment was speedily addressed and fixed, and that, as a result, they had no notice whatsoever with regard to whatever condition caused the ceiling fall of July 2009.

Considering all of the evidence submitted, it is the Court's conclusion that issues of fact remain as to the liability of defendants, and that summary judgment is consequently not warranted. In the first instance, there is a factual dispute between plaintiff and the super as to how many times he was informed about, and subsequently repaired, a ceiling condition - once or twice. If his sole repair occurred many months before the collapse, it is even more unclear as to whether the collapse was related to anything that occurred earlier. Further, there is no indication that any resident of plaintiff's apartment saw any water leak whatsoever in the nearly six months before the ceiling abruptly fell. Plaintiff testified that, when the condition recurred (which the super does not recall) it was merely a discoloration, without water dripping. Plaintiff also acknowledged at deposition that, two

weeks before her accident, she saw the discoloration again, in the same place, but it was not reported to anyone. Nevertheless, that time as well, there was no sighting of water.

The problems sighted in the bathroom occurred over the shower, but plaintiff was injured when the ceiling came down over the sink. It may be that the small size of the bathroom, and the large size of the fallen ceiling area, make this distinction irrelevant, but the Court cannot be sure. Apparently, there were photographs of the area which were identified and marked at deposition, but neither party has thought to attach them as exhibits. The Court cannot draw conclusions as to the relevance of issues above the shower to an injury sustained near the sink, if there are photographs showing the layout of the ceiling area and the party with the burden of proof fails to attach them.

More importantly, though, issues of fact remain as to whether the repair or repairs by the super had any connection to the ceiling fall which plaintiff experienced, whether the super's grouting of the bathroom floor above plaintiff constituted a reasonable response to plaintiff's complaint, or whether such repairs were shown to be so inadequate as to constitute negligent action by defendants, whether a super should have known to immediately check the "standing weight" (under the tub) for a leak, and even whether plaintiff herself was comparatively negligent when she noticed (according to her account) a third instance of discoloration two weeks before the accident but failed to ensure that the super was informed. Plaintiff here has failed to sustain her burden of demonstrating that defendant's repairs were inadequate, but rather, at this point, merely speculates that such was the case.

The cases cited by plaintiff are either too generic in import to offer guidance here, or actually point in a direction opposite to that advanced in plaintiff's argument. In Figueroa v. Goetz, 5 A.D.3d 164, cited by plaintiff, the claim against the defendant coop owner was actually dismissed. Brown v. Linden Plaza, 36 A.D.3d 742, did not involve a grant of summary judgment to plaintiff, but a denial of summary judgment to defendant. In view of the shift in burden resulting from such distinction, it offers little guidance here. In any

event, defendant there was unable to elicit dismissal, in a case which was not based on purportedly inadequate recurring repairs, but rather based on the persistence of a debris accumulation, which is a situation far removed from the instant fact pattern.

For all of the above reasons, plaintiff's motion for partial summary judgment is denied. As indicated supra, defendant's cross-motion is denied as untimely served.

This constitutes the Decision and Order of the Court.

Dated: 11/25/13

MARK FRIEDLANDER, J.S.C.