

Scott v 55 Knolls Crescent, LLC

2014 NY Slip Op 30538(U)

January 6, 2014

Supreme Court, Bronx County

Docket Number: 305124-09

Judge: Julia I. Rodriguez

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX IA- PART 27**

Present: JULIA I. RODRIGUEZ, JSC

Index No.: 305124-09

EILEEN SCOTT, Individually and as Administrator
of the Estate of SHELDON M. SCOTT, deceased,

DECISION & ORDER

Plaintiff,

-against-

55 KNOLLS CRESCENT, LLC, THE KNOLLS
COOPERATIVE SECTION NO. 2, INC. and
MCGLYNN, HAYES & CO., INC.

Defendants,

JAN 15 2014

Recitation, as required by CPLR 2219 (a), of the papers considered in review of motion by Defendant noticed on April 8, 2013 and submitted on Aug 12, 2013:

| <u>Papers Submitted</u> | <u>Numbered</u> |
|-------------------------|-----------------|
| Motion & Exhibits | 1 |
| Opposition & Exhibits | 2 |
| Memorandum of Law | 3 |
| Reply | 4-5 |

Upon the foregoing papers, Defendants 55 Knolls Crescent, LLC and The Knolls Cooperative Section No.2, Inc. (Knolls) move for an Order granting summary judgment and dismissing Plaintiff's complaint, or in the alternative dismissing Plaintiff's wrongful death claim, or in the alternative striking the Answer and Cross-claims of Defendant McGlynn Hayes & Co., Inc. (McGlynn) for spoliation of evidence and granting movants conditional contractual indemnification as against McGlynn.

The instant action was commenced as a result of an accident involving an alleged malfunctioning elevator at the building where deceased Plaintiff resided. McGlynn was called to the premises to fix a problem of the elevator being stuck. It is alleged that McGlynn fixed the problem and the elevator was operating properly. The interlock mechanism of the elevator door malfunctioned causing the door to the elevator to open when the cab was not present. A properly working interlock mechanism would not allow the door of the elevator to open unless a cab was present. Plaintiff stepped into the elevator on the first floor and fell down the shaft to his death.

Knolls owned the subject premises. McGlynn had performed maintenance on the elevator just prior to the accident. The parties concede that McGlynn discarded the interlock mechanism.

Knolls moves to strike McGlynn's Answer based on the discarded interlock mechanism. On a motion for spoilation, the movant must establish that the loss will fatally compromise the case or leave movant without the means to defend the action at trial. *Cameron v Nissan 112 Sales Corp.*, 10 A.D.3d 591, 781 N.Y.S.2d 661 (2nd Dept. 2004). The court does not find that the loss of the interlock mechanism compromises Knoll's defense, in light of the fact that the parties concede that it was replaced because it was not working properly. As such, that portion of Knoll's motion seeking to strike McGlynn's Answer is **denied**.

On a motion to dismiss pursuant to CPLR §3211(a)(7), for failure to state a cause of action, the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action, *Rovello v. Orofino Realty Co., Inc* 40 N.Y.2d 633, 389 N.Y.S.2d 314 (1976) and *Underpinning & Foundation Construction v. Chase Manhattan Bank*, 46 N.Y.2d 459, 414 N.Y.S.2d 298 (1979), unless the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly controverted by documentary evidence. *Beattie v. Brown & Wood*, 243 AD2d 395, 663 N.Y.S.2d 199 (1st Dept. 1997). When a defendant moves to dismiss a cause of action pursuant to CPLR §3211(a)(7) based on legal insufficiency, plaintiff has no obligation to show evidentiary facts to support the allegations of the complaint, as the pleading is to be afforded a liberal construction. Moreover, the Court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). As the criterion is whether the proponent of the pleading has a cause of action, generally, such a determination can be made from the factual allegations in the four corners of the complaint. *Id.*

The court finds that Plaintiff sufficiently stated her causes of action in her complaint. Thus, that branch requesting dismissal pursuant to CPLR §3211 is **denied**.

That portion of McGlynn's motion seeking conditional contractual indemnification is **granted**, as Knolls provided proof in its contract that McGlynn agreed to indemnify Knolls for their own negligence.

The proponent of a motion for summary judgment pursuant to CPLR §3212 must tender sufficient evidence in admissible form to show the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 NYS2d 923 (1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 NYS2d 316 (1985). In a premises liability action, defendant must submit evidence that it maintained its premises in a reasonably safe condition as a matter of law, that it neither created the allegedly dangerous condition nor had actual or constructive notice thereof. *Bodie v. Town Hall Foundation*, 5 A.D.3d 210, 773 N.Y.S.2d 282 (1st Dept. 2004).

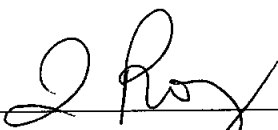
In the instant matter, Knolls failed to eliminate all triable issues of fact with respect to its negligence. Although Knolls argues that it did not have notice of the alleged defect with the interlock mechanism, the court finds that the issue of notice is a question of fact for the jury. Here, Knolls can be charged with notice that there was something wrong with the elevator and it can be charged with notice that McGlynn was on a call to fix the problem with the elevator. Knolls also failed to provide proof or an expert to show that the problem with the elevator being stuck was not related to or did not affect the problem with the interlock mechanism. In as much as McGlynn testified that it ran the elevator for 20 minutes and checked each floor to make sure door was functioning properly, that involves credibility determinations that must be left to the trier of fact.

In an action to recover damages for wrongful death, the measure of damages includes fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. *Johnson v Richmond University Medical Center*, 101 AD3d 1087, 956 NYS2d 568 (2nd Dept. 2012). The essence of the cause of action for wrongful death is that the plaintiff's reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death. *Id.* Loss of support, voluntary assistance, possible inheritance, medical and funeral expenses incidental to death are injuries for which damages may be recovered. *Id.* On a motion for summary judgment, the parties must lay bare ^{their} ~~its~~ proof. Here, Plaintiff has failed to present any evidence of a pecuniary loss to raise an issue of fact with respect to her claim for wrongful death.

Accordingly, the motion by Defendants 55 Knolls Crescent, LLC and The Knolls

Cooperative Section No.2, Inc. is **granted only to the extent** of dismissing Plaintiff's wrongful death claim and granting conditional contractual indemnification as against Defendant McGlynn Hayes & Co., Inc.

Dated: January 6, 2014



Hon. Julia I. Rodriguez, J.S.C.